IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3348 of 2001

HON'BLE MR JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ESSAR STEEL LTD & Others - Petitioner(s)

Versus

UNION OF INDIA, THROUGH SECRETARY & Others - Respondent(s)

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Appearance :

Mr. K.S. Nanavati, Senior Advocate with Mr. S.N. Thakkar, Kunal K. Nanavati, Advocates for M/s Nanavati Associates for Petitioners.

Mr Jitendra Malkan, Assistant Solicitor General of India with Mrs Vasavadatta Bhatt for Respondent no.1.

Mr. Kartikeya Thakar for M/s Trivedi & Gupta for respondent no.2.

Mr. Dushyant A. Dave, Senior Advocate with Mr. S.S. Panesar for respondent nos.3, 4 and 5.

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CORAM : HON'BLE MR JUSTICE KS JHAVERI

Date :11 /10/2005

CAV JUDGEMENT

1.0 While dealing with the diverse contentions raised by the parties in the petition, the consequential issues which arose for consideration of this Court are (i) whether a government monopolistic company established with the object of accelerating the growth of national economy should concentrate on profit motive alone in the course of discharge of its functions, and (ii) whether such a company has the authority to deviate from the directions issued by the Central Government in policy matters and act arbitrarily and unreasonably for the sole purpose of making super profit.

2.0 The petitioner Essar Steel Limited has prayed for quashing and setting aside notice dated 1.5. 2001 whereby the respondent nos.3 to 5 have sought disconnection of supply of gas for non-payment of transportation charges; to restrain the respondents, their officers, servants from acting in any manner contrary to the Government pricing orders dated 31.12.1991, 18.9.1997 and 30.9.1997; to direct the respondents to implement orders dated 21.5.1999 and 5.7.1999 issued by the respondent no.1 pursuant to the recommendations dated 5.4.1999 tendered by the Committee constituted by the respondent no.1 and to issue revised invoices in consonance with the said orders; to hold and declare that the petitioner company is not liable to pay the transportation charges or the price for supply of gas along the Ex-HBJ pipeline and to hold and declare that the respondent nos.3 to 5 are not entitled to charge any price or charges contrary to the pricing orders issued by the respondent no.1. from time to time.

3.0 To decide the controversies raised in this petition it is necessary to set out the facts which led to the filing of the present petition as under:

3.1 The petitioner M/s Essar Steel Limited is a public limited company incorporated and registered under the provisions of the Indian Companies act, 1956, which is engaged in the business of production of sponge iron and steel at Surat. At that time vide allocation letter dated 10.10.1986 the petitioner was allotted 0.50 MMSCMD of gas on firm basis. Thereafter vide allocation letter dated 6.8.87 the petitioner was alloted 0.35 MMSCMD of gas on fall back basis. The steel complex was set up in the year 1989-90 solely for the reason that natural gas was available in abundance at Hazira and most of the gas had remained unutilized on account of lack of the requisite demand. The petition company therefore set up the aforesaid steel complex at Hazira at an infrastructural costs of Rs.6000 crores as it appears that there was an assurance from the ONGC/Government of India that the price for supply of gas would be such price as may be fixed by the Government of India from time to time. According to the petitioner, it is on the aforesaid assurance that the petitioner has invested the aforesaid amount and approximately 10000 people depend on the petitioner company for their livelihood on account of the direct/indirect employment as well as in the ancillary activities.

3.2 Respondent no.1 is Central Government i.e. Department of Petroleum and Natural Gas (hereinafter referred to as MoPNG) which controls the respondent no.2 Oil and Natural Gas Corporation Limited (hereinafter referred to as ONGC) is incorporated under the ONGC Act in 1958.

3.3 Respondent no.3 is Gas Authority of India Limited (hereinafter referred to as GAIL) which is incorporated for the purpose of transportation and marketing of natural gas, and respondent nos.4 and 5 are officers of respondent no.3. GAIL was established by the Government of India for handling diverse post exploration and production activities relating to Natural Gas viz. Transportation, processing, distribution and marketing of gas and its fractions and by-products. It enjoys a dominant position in the transmission and marketing of gas. GAIL handles about 95% of the gas business in India and has substantial investment in the gas transmission and processing facilities to accommodate all the projected increase in gas production. It has demonstrated strong management capabilities. GAIL has a corporate mission of accelerating and optimizing the effective and economic use of Natural Gas and its fractions to the benefit of national economy. It has commissioned Hazira-Bijapur-Jagdishpur pipeline (HBJ pipeline), which linked Western India to central and northern India. In 1991, GAIL constructed its first LPG plant at Bijapur and in 1992 took over ONGC/s gas distribution pipelines. GAIL sources 90% of its natural gas requirements from ONGC and the balance from OIL. GAIL's pricing is based on actual cost of gas plus its transportation charges.

3.4 In view of the decision of the Central Government to divert the activities of the respondent no.2-ONGC, and respondent no.2 to concentrate only on production of natural gas, respondent no.1 formed “Gas Linkage Committee” (hereinafter referred to as GLC), which is an inter ministerial committee to decide allocation of gas. The gas produced by ONGCL & and JV consortiums is marketed by GAIL. The gas

produced by OIL is marketed by OIL itself, except in Rajasthan where GAIL is marketing its gas. Gas is allocated to consumers by this Ministry on the recommendations of Gas Linkage Committee which is an inter-Ministerial Committee with representatives from the Planning Commission and the Ministers of Finance, Power, Chemicals & Fertilizers and Steel. Prior to 1986 the respondent no.2 was deciding the price of natural gas and there were serious discrepancies in price and there was discriminatory treatment to the consumers. In that view of the matter the respondent no.1 decided to have a fixed price of natural gas. By circular dated 30.1.1987, the price of gas was fixed by the Ministry of Petroleum and Natural Gas, which price was exclusive of royalty, taxes, duties and other statutory levies and the said price was made effective immediately.

3.5 A contract was entered into between the petitioner and the respondent no.2 on 24.1.1990, at the price fixed under price order of 1987, for supply of (i) 0.50 MMSCMD of gas on firm basis and (ii) 0.35 MMSCMD of gas on fall back basis i.e. as and when available for a period of 10 years. The quantity, period of contract, price and other particulars are part of the agreement which was produced at Annexure-A to the petition. “Firm basis” would mean that the supply of gas would be regular and “fallback” would mean that the supply of gas would be as and when available. On 2.6.1990 the respondent no.2 addressed a communication to the petitioner stating therein that there was no surplus gas available which could be supplied on fallback basis, but if the petitioner requires quantity of gas more than 0.35 MMSCMD, the respondent may try to meet the demand by opening free gas wells and that would be possible only if the petitioner was ready to pay full price of gas for the gas upto 0.50

MMSCMD. In response to the said communication the petitioner replied that the petitioner did require gas much in excess of 0.50 MMSCMD and that if the respondent Corporation was not in a position to supply the additional quantities on fallback basis, it will have no alternative but to take additional quantity at the full rate and therefore ONGC may continue to supply additional quantity and charge full rate. In view of the request of the petitioner, the respondent no.2 made special arrangements and completed the formalities to supply additional quantity of gas to the petitioner.

3.6 By letter dated 20.8.1990 addressed to respondent no.2 ONGC the petitioner informed them that there is a definite commitment from Ministry of Petroleum and Natural Gas for supply of additional quantity of 0.35 MMSCMD on fallback basis. In response to the said communication, the respondent no.2, by their letter dated 30.8.1990, pointed out that as special arrangements were made to give additional gas, the petitioner is required to make payment as per the invoice. On 4.9.1990 the petitioner was allocated 0.90 MMSCMD gas on firm basis. The petitioner wrote letter dated 6.10.1990 to respondent no.2 confirming that they are willing to pay the committed price for the entire quantity. Since the petitioner was in need of further supply of 0.90 MMSCMD gas on firm basis, an agreement was executed on 20.8.1991 between the petitioner and the respondent no.2, by way of amendment of the earlier agreement dated 24.1.1990 for additional supply of 0.90 MMSCMD gas on firm basis. The additional supply was for the export oriented unit of the petitioner. The said agreement provided that the price of gas shall be as per decision of Government of India from time to time. In view of this the fallback basis allotment of

0.35 under the agreement dated 24.1.1990 was cancelled and the total quantity 0.50 (domestic) + 0.90 (EOU) was on firm basis. Any additional quantity over and above this was at the same price. The amended Annexure-II reads as under:

> "Price of Gas: (i) The price of GAS shall be as per decision of the Government of India from time to time. Till decision of the Government is received, the Buyer shall pay at the rate of Rupees One Thousand Four Hundred only (Rs.1400/-) per One Thousand (1000) standard cub meters of gas which shall be adjusted on receipt of Government of India's decision in this behalf. This price shall be charged for the entire quantity of gas to be supplied under this Contract including in excess of 14,00,000 M3/day."

3.7 The Government of India issued price order No.L-12015/2/88-GP, dated 31.12.1991 wherein it revised the price of natural gas with effect from 1.1.1992. The relevant clauses are as under:

> "(i) The price of onshore gas and for offshore gas at landfall point, will be Rs.1550/1000 cu. mts.
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> (ii) The above prices would be raised by Rs.100/1000 cu. Mts. At the end of each year for a period of three years, that is, the prices of onshore gas and offshore gas at landfall points, would be Rs.1650/1000 cu. mts. With effect from 1.1.1993, Rs.1750/1000 cu. mts. With effect from 1.1.1994 and Rs.1850/1000 cu. mts. With effect from 1.1.1995.
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> (iii) Along the HBJ pipeline, the price of natural gas would correspondingly be Rs.2400/1000 cu. mts. w.e.f. 1.1.1992, and Rs.2500, Rs.2600 and Rs.2700 with effect from 1.1.1993, 1.1.1994 and 1.1.1995 respectively."

3.8 ONGC, under instructions of Government of India, transferred its gas marketing function to GAIL on 16.5.1992 on the same terms and conditions. GAIL is entrusted with the function of transporting, supplying and marketing gas by Government of India. However, Gas Linkage Committee is the authority to decide the allocation as well as quantity of gas to be supplied to various consumers.

3.9 A contract was entered into between the parties on 1.1.1993 wherein Article 10.04 reads as under:

> "10.04 The price of Gas in Article 10.01(1) & 10.01(b) and 10.2 above is exclusive of Service Charges, Royalty, Taxes, Duties and all other statutory levies as applicable at present or to be levied in future by the Central or State Government or Municipality or any other local body or bodies payable on sale of GAS from ONGC to SELLER, or on sale of GAS from SELLER to the BUYER which shall be borne by the BUYER over and above the aforesaid price.

3.10 A fresh contract for supply of 0.90 MMSCMD for EOU project between the petitioner company and GAIL was entered into by replacing the original contract dated 20.8.1991 with ONGC. The new contract also provided that the price of 1000 SCM shall be as per the Government of India Pricing Order dated 31.12.1991 and that GAIL shall have the right to revise the price of gas as per directives, instructions, orders, etc. of Government of India. Under this contract GAIL has been recovering metering charges at Rs.20/- per 1000 SCM only in respect of the quantity supplied under this contract, which is not permitted under various Government Pricing Orders. The allegation is that no such metering charges are recovered from any other consumers or even in case of petitioner company in respect of other quantities. All the contracts whether with ONGC or with GAIL, specifically declare that the price for supply of gas would be as per the directions, instructions, orders, etc. of Government of India as may be issued from time to time.

3.11 In January 1995 the Government of India set up a committee under the Chairmanship of Mr.T.L. Shankar to review the entire question of natural gas

pricing. It is required to be noted that right from 1993, due to the requirement of natural gas, the petitioner had always requested for conversion of 0.35 MMSCMD from fallback to firm basis and for allocation for petitioner's power plant. Allocation was made to the petitioner as well as to VMC, GNVFC, IPCL and GSFC who are equated with HBJ pipeline consumers and the said consumers are not taking their gas through their own pipeline, whereas the petitioner is taking gas from landfall point and from that the gas is transported to the factory in their own pipeline. GAIL has written letter dated 14.3.1997 to Ministry of Petroleum and Natural Gas stating that the GAIL has converted allocation of 0.35 of MMSCMD of the petitioner company from fallback to firm allocation, but no further gas is available to consider allotment for power plant and that even excess gas which is available due to offshore fields would also be for limited period.

3.12 The petitioner company has written letter dated 8.2.1996 to GAIL wherein, while referring to two pending issues of firming up of fallback allocation (0.35 MMSCMD) and allocation of gas to 515 MW power plant, the petitioner company stated that the petitioner company had been advised by one of the consumers viz. NTPC for their Kawas project that they are agreeable to pay higher price to GAIL for supply of gas to them at Hazira, on the basis of Ex-HBJ pipeline price and that the petitioner has been advised that they should agree to pay the same price for the above two prices. It was further stated that the petitioner came to know that Government of India has appointed a committee under Shri T.L. Shankar, to review the prices of gas to the industrial consumers. The petitioner company has therefore stated that looking to the critical position they are placed in and keeping in mind the

urgent need for the above issues to be resolved, and as advised by their client, the petitioner company agrees to pay the price on similar terms and conditions pending finalization and implementation of Shanker Committee's recommendation as would be applicable to all users of natural gas. The petitioner company specifically mentioned in the said letter that such supply shall be at the "HBJ price" till such time the new price order was issued by the Government of India.

3.13 The minutes of Gas Linkage Committee held on 28.3.1996 observed as under:

> "... GLC noted that there has been substantial improvement in the supply of gas to Hazira and the HBJ following the commissioning the second Bassein-Hazira pipeline ... The diversity factor is not likely to exceed 12.5% (which is considered acceptable) even after fallback allocations are firmed up. ..."

Accordingly GLC approved the conversion of following fallback allocations into firm allocations:

1.	IPCL	:	09 MMSCMD
2.	GSFC	:	0.45 MMSCMD
3.	ESSAR, Gujarat	:	0.35 MMSCMD

3.14 The Committee in its meeting held on 16.4.1996 with regard to agenda item no.6 held as under:

> "GLC considered the proposal for converting the falback allocations in favur of IPCL, GSFC and Essar, Gujarat into firm allocations. GLC noted that there has been a substantial improvement in the supply of gas to Hazira and the HBJ following the commissioning of the Second Bassein-Hazira pipeline. In terms of the present projections of demand and availability, the diversity factor is not likely to exceed

> 12.5% (which is considered acceptable) even after the fallaback allocations are firmed up. GLC also noted that the respective administrative Ministries have recommended the long standing demands of these units for the conversion of their fallback allocations into firm allocations."

In the year 1997-98 the allocation of gas was 1.20 MMSCMD which was as per Ministry's advice to avoid flaring up of gas. Thereafter the Government of India vide its order dated 20.5.1996 approved the allocation of 0.35 MMSCMD from fallback allocation to a firm allocation in view of the improved position of supplies and directed the petitioner company to enter into an amended contract accordingly with GAIL within 60 days from the issuance of the order. In pursuance of the same a supplementary agreement was entered into between the petitioner company and GAIL for conversion of 0.35 MMSCMD from fallback allocation to firm basis.

3.15 The said contract came into force with effect from 11.7.1996. Article nos.5.01 and 5.02 were deleted and were replaced by Articles 5.01 and 5.02. Article 11.01, 11.02 and 11.03 and Annexure-II of the existing contract stood deleted and were replaced by new Article 11.01 which reads as under:

> "The buyer shall pay to the seller the present price of 1000 (One thousand) Standard Cubic Meters of Gas as per Government Pricing Order No.L-12015/2/88-GP dated 31.12.1991 for 0.50 (Zero Point Five Zero) Million Standard Cubic Meters per day of gas. The buyer has further agreed to and shall pay for supply of Gas in excess of 0.50 (Zero point Five Zero) Million Standard Cub Meters per day at ex-HBJ price of gas as per the aforesaid Government pricing order. <u>After expiry of the period of Government pricing order No.L-12015/2/88-GP dated 31.12.1991, seller shall fix the price of gas as per directive, instruction, order etc., of Government of India which is likely to be market related in accordance with the current policy of liberalisation of Government of India and the buyer shall pay to the seller such price of gas.</u> The price of Gas is exclusive of Royalty, Taxes, Duties, and also

other statutory levies as applicable at present or to be levied in future by the Central or State Government or Municipality of any other local body or bodies payable on sale of Gas form ONGCL to the seller or on sale from seller to the buyer, and shall be borne by the buyer over and above the aforesaid price. Provided further that for supply of gas made by the seller to the buyer on fall back basis with effect from 16.5.1992, the price applicable shall be the full price of gas as applicable for gas supply made by the seller to the buyer on firm commitment basis. (emphasis supplied)

3.16 It is required to be noted that on account of commissioning of new fields, the supply of gas improved substantially which was offered by GAIL to various consumers including the petitioner company. The sub-committee submitted their report in September 1997. The committee's recommendation on natural gas pricing reads as under:

"Transportation charges for all pipelines other than HBJP, is fixed by GAIL in such a way that their costs plus tax plus a post tax return of 12% is recovered on their equity investment in pipeline. In case of HBJP, the return has been fixed by the Government – based on Long Run Marginal Cost at Rs.850/-. This is evident from the pricing control order dated 31.12.1991 where the land fall price is given at Rs.1550/- while HBJP is given at Rs.2400/- (1550+850). The transportation charges for supplies to HBJ pipeline to increase from Rs.850 tcm to Rs.1150 tcm and thereby constant for the entire pricing period. Thus, the Shanker Committee has fixed two prices, one being landfall price and the other being ex-HBJ price similar to what was done under the 1991 pricing order. The only difference being that the transportation charges in the 1991 pricing order for ex-HBJ price was Rs.850 included in the price, while under this pricing order since the price of gas was to be deregulated in due course.

3.17 The Government of India vide order dated 18.9.1997 revised the price of natural gas with effect from 1.10.1997 and determined it as under:

(i) The consumer price of gas at landfall points would be linked to the price of a basket of low speed/high speed fuel oils as shown in the table below:

Year	General price	Concessional price for

		The North-East State
1997-98	55%	30%
1998-99	65%	40%
1999-2000	75%	45%

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(b) The transportation charges payable to GAIL along with HBJ pipeline was fixed at Rs.1150/-.

3.18 By communication dated 30.9.1997 the Government of India issued direction for fixation of price of gas providing, inter alia, as under:

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"b. As the international prices of fuel oil for September,1997 would only be available by the first fortnight of October 1997, the price of the basket of fuel oils mentioned above may be fixed for the quarter October-December 1997 taking into account the prices of fuel oils for the months of June, July and August 1997. This methodology of calculating the price shall be followed for each subsequent calendar quarter."

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f. The consumer price per thousand SCM for the quarter October-December, 1997 as per the approved calculations works out to Rs.2224.68 for the general price and Rs.1104.37 for concessional price in North-East. These prices are for gas having net calorific value of 10,000 K. Cal per SCM. Since the consumer prices so determined are below the floor price approved by the Government, the general consumer price shall be Rs.2150 per thousand SCM and concessional consumer price (for North-Eastern States) shall be Rs.1200 per thousand SCM for the calendar quarter of October-December, 1997. However, for gas having a different calorific value, the price shall be adjusted pro-rata.

g. The methodology for arriving at the producer price suggested at para 3 of the proposal of GAIL outlined in the letter of Director (Fin), GAIL referred to above, is approved. The producer price for the quarter October-December, 1997 calculated in the above basis at 10,000 K. Cal. (net) per SCM works out to Rs.1800/thousand SCM and the same is approved.

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k. For all subsequent quarters upto 31.3.2000, GAIL shall follow the

methodology as mentioned in the above paras and notify the gas price for each quarter.

l. In addition to the price as fixed above, the transportation charge, royalty, taxes, duties and other statutory levies on the production, transportation and sale of natural gas will be payable by the consumer."

3.19 GAIL has written a letter dated 3.10.1997 to Ministry of Petroleum stating that there is shortage of gas; that there is already extra allocation of 30% which is much more than the standard practice of 12.5% diversity factor and therefore supply of gas is being made as per the action plan approved by the Gas Linkage Committee from time to time and that in spite of the above shortage the fallback allocation of 0.35 MMSCMD to Essar was converted to firm allocation. Thereafter GAIL has written a letter dated 4.10.1997 to the petitioner stating that the price of natural gas was determined at Rs.2150/- per 1000 SCM and HBJ transportation charges of Rs.1150 per 1000 SCM, although transportation charges were not part of the price at all and not payable by the petitioner. According to the petitioner this is the beginning of the present dispute between the parties. In response to the above letter the petitioner wrote a letter to GAIL stating that in view of the pricing order and price determination, GAIL could not levy transportation charges on 0.35 and adhoc/fallback supplies and also service charges despite which GAIL continued to demand the same on the ground that the same was in accordance with the contract. Thereafter on 6.10.1997 GAIL has written a letter to the Ministry of Petroleum highlighting the shortage of gas in western region whereby GAIL has annexed a copy of the communication dated 26.8.1987 from APS in this regard.

3.20 GAIL issued a circular dated 15.10.1997 regarding the price of gas for the

quarter October-December 1997, according to which the consumer price was Rs.2150/- and HBJ Transportation charge was Rs.1150/-. The petitioner addressed a letter to GAIL on 22.10.1997 in the context of contract dated 17.7.1996 stating that the price of gas should be as per the price order and that since the petitioner is transporting its gas through its own pipeline, the GAIL should not charge transportation charges. The petitioner has again written a letter dated 3.11.1997 to GAIL requesting to revise the invoices (which is at page 583) so as to bring the same in line with the pricing orders of the Government of India. According to the petitioner, GAIL has demanded basic price of Rs.3300 per 1000 MMSCMD in respect of supply of gas of 0.35 MMSCMD (on firm basis) as well as supplies made on fallback basis or on ad hoc basis from July 1997 whereas the basic price fixed under the price order dated 18.9.1997 by the Government for non-HBJ consumers is Rs.2150 per 1000 MMSCMD.

3.21 The respondent No.5 wrote a letter dated 5.12.1997 to the petitioner stating that as per article 10 of the contract dated 1.1.1993 the price of gas shall be as per the directive of the Government from time to time and directed the petitioner to pay for service charges in accordance with the bills raised. The invoices dated 16.12.1997, 16.2.1998 and 16.2.1998 produced at page nos.134, 137 and 138 of the compilation which are invoices raised on Essar wherein basic price included transportation charge and relevant column of transportation charge shown as Nil. In response to the same the petitioner wrote letter dated 10.3.1998 stating that since gas was being transported through the petitioner's own pipeline without even touching the ex-HBJ pipeline the GAIL was not authorized to charge any price

whatsoever beyond the consumer price fixed by the Government of India. Regarding the levy of metering chargers it was stipulated that the said levy is unjustified since there is no service whatsoever being provided by GAIL and in any case the charges should be made applicable uniformly for all consumers and users on the basis of cost of service, if any, rendered. In reply to the letter of the petitioner the respondent wrote letter dated 26.3.1998 to the petitioner stating that they have examined the petitioner's case once again and it has been observed that the bills are being raised in accordance with the supplementary agreement dated 17.6.1996 entered into between GAIL and petitioner, which provides the gas supply in excess of .50 MMSCMD is payable at ex-HBJ price. The petitioner has relied upon invoices of the Reliance and petitioner dated 16.4.1998 and 1.5.1998 to contend that during the same period while the petitioner was charged transportation charges, Reliance was not charged the same. Both the said invoices are at pages 207 and 208 of the compilation. Invoice dated 16.4.1998 raised on Reliance Industries wherein the basic price was charged as per price order of 1997 and no transportation charge was levied. Relevant column of transportation charge shown as "Nil" as no transportation charge was leviable. Invoice dated 1.5.1998 raised on the petitioner the basic price shown is Rs.3421/- which included transportation charge and in relevant column of transportation charge it is mentioned as "Nil" despite the fact that no transportation charge was leviable.

3.22 The petitioner wrote a letter dated 5.5.1998 stating that the respondents have charged ex-HBJ pipeline basic price of Rs.2700/- from July 1997 to September 1997, Rs.3330/- from October 1997 to December 1997, Rs.3561/- from January 1998 and

Rs.3421/- from April 1998; whereas the mount should have been charged at the general rate of Rs.1850/-, 2150/-, 2411/- and 2271/- per 1000 SCM respectively. It was further stated that the consumer who has received additional gas through their own pipeline has been charged at the general rate and there is no justification for charging its higher rate. The petitioner has enclosed a debit note amounting to Rs.41,92,75,511/- towards the excess claim. The petitioner again wrote a letter on 12.5.1998 to respondent No.3 stating that the price of gas to be charged in case of the petitioner should be in accordance with the Government of India pricing order dated 18.9.1997 with effect from 1.10.1997.

3.23 GAIL forwarded a write up on 15.5.1998 to MoP & NG, bringing out the facts that (i) GLC allocation to Hazira and HBJ consumers is of the order of 5.62 and 30.24 mmscmd respectively. Hazira consumers quantity of 5.62 consists of Essar 1.75(0.50+0.90+0.35), RIL 0.50, Kribhco 3.0, GGCL 0.30 and HWP 0.075; (ii) to avoid flaring GAIL has supplied 7.9 MMSCMD as against 5.62 MMSCMD to all Hazira consumers and that (iii) since capacity of HBJ enhanced to 33.4, supply to Hazira consumers should be restricted to GLC allocation of 5.62 to avoid loss to others. According to the petitioner, this show that adhoc/fallback supplied to the petitioner and other consumers were to avoid flaring. Therefore petitioner company, on adhoc/fallback supplies from 1997 to 1998, has claimed that GAIL should not have charged HBJ transportation charges on the supplies to the petitioner and should have granted 15% discount in terms of government pricing orders. Since the petitioner wanted to adhoc/fallback supplied to be continued further, it accepted that for supplies of additional quantity of 1.40 MMSCMD (over and above 1.75), it would

pay HBJ transportation charges till the regularization of the same by MOP& NG and it would abide by terms of such allocation by government. According to the petitioner, they have agreed to pay HBJ transportation charges only for additional supply of 1.75 MMSCMD and not for 0.35 MMSCMD which was originally on fallback basis which was confirmed by GLC without any condition. GAIL, vide letter dated 11.6.1998, informed the petitioner that additional supply of gas over and above the existing contracted quantity/allocation of 1.75 MMSCMD would be at a price applicable to consumers along the HBJ pipeline. As per the invoice dated 16.7.1998 HBJ transportation charges had been recovered from Reliance Industries also.

3.24 Gas Linkage Committee, in their minutes of meeting dated 16.10.1998, has agreed for additional allocation of 1.40 MMSCMD on fallback basis to increase total allocation of petitioner to 3.11 MMSCMD as and when further gas available from additional development of Tapti fields. However, no condition about transportation was made. Since GAIL did not stop levying of transportation charges on 0.35 and adhoc/fallback supplies, disregarding the pricing order issued by Government, the petitioner submitted a representation to Minister, Petroleum and Natural Gas, praying for intervention in the matter and to advice the respondents to refund the pipeline charges wrongly levied, with interest at the rate of 24% per annum being the rate charged by the respondent no.3 in case of delayed payment. The petitioner received a letter from Ministry of Petroleum conveying the approval of allocation of further 1.40 MMSCMD on fallback basis subject to transportation charges being borne by the petitioner. It is required to be noted that the invoice raised on the petitioner on 16.11.198 shows that the basic price shown was Rs.3372/- including the

transportation charge and relevant column of transportation showed “Nil”.

3.25 According to the respondents, the basic price in invoices issued by GAIL in case of EOU Unit or Domestic Unit, upto 0.50 is not ex-HBJ price and excludes the transportation charges, but the invoices in case of 0.35 given to Domestic Unit is ex-HBJ price and consequently includes transportation charges in the basic price. According to them, these are various provisional invoices issued without prejudice and consequently do not include in the ex-transportation charges. By letter dated 21.12.1998 the Ministry of Petroleum and Natural Gas addressed a letter to Essar conveying the approval of the Government to an additional allocation of gas of 1.40 MMSCMD, on fall-back basis. In the said letter it is specifically mentioned that the transportation charges shall be borne by petitioner.

3.26 On 1.2.1999 GAIL raised an invoice on the petitioner wherein the basic price plus transportation charge is shown as Rs.3365/- and relevant colum of transportation shows “Nil” (page 324 of paperbook). The petitioner again approached the Ministry of Petroleum and Natural Gas by their representation dated 10.2.1999 requesting to advise GAIL not to charge transportation charges on additional allocation of 1.40 MMSCMD on fallback basis and requesting for firming up the same. Again the petitioner made a representation before the Ministry of Petroleum and Natural Gas on 25.2.1999 for the very same purpose. In pursuance of the representations made by the petitioner the respondent no.1 issued an Office Memorandum on 11.3.1999 wherein it was decided by the Ministry of Petroleum and Natural Gas to constitute a committee which would examine and submit its

recommendations to the Secretary after giving due opportunity to the petitioner and the respondent no.3 to state their respective cases. It was further directed the committee to submit its recommendations within 10 days from the date of issue of communication.

3.27 A brief note was prepared by the respondent no.3 on 23.3.1999 on representation from the petitioner for refund of transportation charges. Both the parties appeared before the Committee on 30.3.1999 and submitted their written representations.

3.28 Though the hearing took place on 30.3.1999, GAIL issued a notice on 1.4.1999 to the petitioner for discontinuation of gas supplies in view of outstanding dues of Rs.1,29,98,93,757/-. The invoice dated 16.4.1999 shows the consumer price at Rs.3167/- and relevant column of transportation charge shows Rs.1150/-. The Committee constituted to examine the case of the petitioner, after hearing both the parties, submitted its report on 4.5.1999 recommending that in view of the facts of the case, transportation charges could not be levied by GAIL for supply of NG to the petitioner. The said Committee opined that GAIL should not have charged the HBJ price/HBJ transportation charges from petitioner for the period from 1.10.1997 onwards as it is neither in accordance with pricing orders nor is there an agreement between the parties to the contract. The Committee, therefore, recommended that the representation of the petitioner be forwarded to GAIL and GAIL may be asked to take action as per the gas pricing orders dated 18.9.1997 and consequently refund extra charges, if any, collected by GAIL from petitioner with effect from 1.10.1997

onwards.

3.29 In view of the notice issued by GAIL the petitioner wrote letter dated 13.4.1999 requesting it to give time to pay the amount and continue to supply gas at least upto 15.5.1999. GAIL therefore wrote letter dated 13.5.1999 to Ministry of Petroleum & Natural Gas pointing out that huge amount of Rs.40 crores is outstanding for the period upto 10.5.1999 and if the dues are not paid by 15.5.1999 GAIL shall be constrained to discontinue gas supply to the petitioner with effect from 16.5.1999. The respondent no.3 pointed out letter from the petitioner to GAIL dated 15.5.1999 and stated that the petitioner has admitted their liability vide said communication. According to GAIL the petitioner has stated in the said letter that: (i) the LC for an amount of Rs.6 crores in favour of GAIL has been furnished at Hazira Office on 15.5.1999; (ii) arranged to remit another Rs.4 crores within a week starting from 17.5.1999; (iii) an amount of Rs.20 crores was to be paid during June;(iv) balance Rs.10 crores was to be paid in the first fortnight of July 1999 and that the current dues was to be cleared in the later half of July 1999. Ultimately on 16.5.1999 the respondents stopped supply of gas to the petitioner, but the same was restored after the petitioner gave written assurance to liquidate the dues.

3.30 Based on the recommendations of the Committee, the Government issued an order on 21.5.1999 to GAIL stating that GAIL should follow gas pricing orders dated 18.9.1997 and 30.9.1997 and accordingly fix the transportation charges with effect from 1.10.1997. In the invoice dated 1.6.1999 the consumer price shown is Rs.3167/- and transportation charge is levied at Rs.1150/-. GAIL has written a letter dated

3.6.1999 to Ministry of Petroleum requesting to issue clear directive from Government so that refund can be granted to the petitioner. GAIL also stated that before issuing the order the Government should take into consideration GAIL's clarification before the committee on entitlement to get transportation charges in terms of agreement dated 24.1.1990, 17.7.96 and 11.6.1998 between GAIL and the petitioner and also in terms of GAIL's note dated 15.5.1998 and 11.6.1998. Thereupon the Ministry of Petroleum issued letter dated 28.6.1999 to GAIL stating that GAIL should fix the transportation charges with effect from 1.10.1997 as per the Gas Pricing Orders of the Ministry dated 18.9.1997 and 30.9.1997 and to refund the excess transportation charges with effect from 1.10.1997. Ministry of Petroleum and Natural Gas also written a letter dated 5.7.1999 to GAIL directing to follow the gas pricing order issued by the Government vide letters dated 18.9.1997 and 30.9.1997 and accordingly fix the transportation charges with effect from 1.10.1997. It was stated in the said letter that HBJ transportation charge is not applicable in this case.

3.31 It would be profitable to quote clauses 4.01 and 10.01 of the Contract dated 18th February 1998 as under:

> 4.01 Gas supplied shall be measured at the Gas Metering Station located at SELLER's premises at Hazira, District Surat, Gujarat. GAS will be transported from the down stream flange of the pipeline at the outlet of the Gas Metering Station upto the premises of the BUYER by means of a pipeline provided and maintained by the SELLER at its own cost. The GAS shall be delivered to the BUYER as the Gas Control Station of the BUYER in the BUYER's premises, hereinafter referred to as point of delivery.
>
> *** *** **
>
> 10.01 The BUYER shall pay to the SELLER full price of GAS including transportation charges for consumers on HBJ pipeline as is applicable from

time to time to consumers along the HBJ pipeline. The present price of 1000 (One thousand) Standard Cubic meters of GAS w.e.f. 1.10.1997 is applicable as per Government Pricing Order No.12015/3/94-GP dated 18.9.97 (Annexure-III) which is linked with non-calorific value of GAS supplied. After 31.3.2000 the SELLER shall have right to fix the price of GAS which may be as per the directive, instruction, order, etc. of the Government of India which is likely to market related in accordance with current policy of liberalisation of the Government of India and the BUYER shall pay to the SELLER such price of GAS. Provided further the price of Gas so fixed is exclusive of Royalty, Taxes, Duties and all other statutory levies as applicable at present or to be levied in future by the Central or State Government, Municipality or any other local body or bodies payable on sale of GAS from ONGCL to the SELLER or on sale from the SELLER to BUYER, these shall be borne by the BUYER over and above the aforesaid price."

3.32 GAIL recorded the decision of the Board in its meeting held on 28.7.1999 to refund/adjust the amount towards future supplies to the petitioner. It was also noted that the petitioner should be asked to give an undertaking not to claim interest. It is required to be noted that the Articles of Association in clause 127 directs that GAIL must immediately give effect to the directions/orders of the Government.

3.33 Since the petitioner did not make payment GAIL issued letter dated 23.9.1999 to the petitioner regarding non-payment of bills. It appears that in spite of the above position, GAIL has written a letter dated 23.9.1999 to Government of India as regards the aspect of refund stating that according to GAIL nothing was refundable to the petitioner and it was a matter of contract between GAIL and the petitioner. The petitioner has written a letter to the respondent on 5.10.1999 and made a commitment to open Letter of Credit and also to clear the current bills. Therefore the decision of discontinuing gas supply was kept in abeyance. Thereafter Ministry of Petroleum issued a letter dated 6.10.1999 stating that the issue regarding transportation charges levied by GAIL for supply of natural gas to the petitioner is

under clarification and therefore requested that until the matter is sorted out, the gas supplies may not be discontinued. The Ministry of Petroleum & Natural Gas has written letter dated 20.10.1999 stating that discussions were held in the matter of transportation charges applicable to the petitioner and certain further inputs are required and therefore another meeting will be convened on a later date to resolve the issue. It was also stated that GAIL may take further action after the outcome of the next meeting. Letter dated 20.10.1999 shows that GAIL continued to take up the matter with Government of India as regards the aspect of refund since according to GAIL nothing was refundable to the petitioner. GAIL has also taken an opinion of one Shri Arvind K. Nigam on 21.10.1999 regarding transportation charges taken by GAIL. According to GAIL the outstanding dues continued to raise and stood at around Rs.78.32 crores as of 14.12.1999.

3.34 GAIL has written letter dated 24.12.1999 to Deputy Secretary, Ministry of Petroleum and Natural Gas, Government of India stating as under:

> "ESL contends that transportation charges are under dispute and therefore gas supply to their plant should not be stopped. GAIL, however, has clarified that M/s ESL must clear total outstanding amount failing which the gas supply will be stopped w.e.f 01.01.2000.
>
> In the light of the above circumstances and keeping in view the fact that the total outstanding dues as on 20.12.1999 to Rs.86.08 crores (including the current outstanding amounting to Rs.20.78 crs. After October 1999), we request to MoPNG kindly advice GAIL suitably and also communicate its decision on GAIL's letter 23.09.1999 seeking review of the matter by MoP&NG and reference of the dispute to arbitration."

3.35 GAIL thereafter issued another notice dated 1.1.2000 for discontinuation of gas supply with effect from 0600 hrs of 1.1.2000. The petitioner therefore wrote a

letter dated 10.1.2000 to Ministry of Petroleum requesting to advise GAIL to comply with the instructions of Ministry of Petroleum and also requesting to adjust the refundable amount against dues, so that GAIL settle the account and does not issue instructions for disconnection of gas supply. GAIL thereafter addressed a letter dated 28.4.2000 to the petitioner regarding additional quantity of gas of 1.40 MMSCMD over and above firm allocation of 1.71 MMSCMD on fallback basis specifically stating that : “Essar Steel Ltd. agree to pay for such supply of gas, over and above the firm allocation of 1.71 MMSCMD at a rate applicable to the consumers located along HBJ pipeline, including transportation charges as applicable along the HBJ pipeline which is presently Rs.1150 per 1000 MMSCMD.” The petitioner accepted the same by making an endorsement thereon that: “regarding clause no.2, the acceptance is without prejudice to the claim for applicability of supply of landfall point price in our case and therefore non-applicability of transportation charges in our cases and it being refunded in case the pending claim on the issue is settled in our favour for supply against above.”

3.36 According to the petitioner, despite there being fallback allocation dated 21.12.1998 for 1.40 MMSCMD on fallback basis, GAIL wrote letter to the petitioner to accept levy of HBJ transportation charges on supply of 1.40 MMSCMD on ball back basis and this is another insistence by GAIL to accept levy of transportation charges.

3.37 Gas Linkage Committee prepared a minutes dated 26.5.2000 wherein recommendation is made to the firm allocation to the petitioner as under:

> 9.1 The proposal of Conversion of fallback allocation into firm in respect of consumers ex-Hazira was discussed. The representative of Deptt. of Fertilisers stated that if surplus gas is available then priority should be given to fertiliser sector. Whereas, the representative of Ministry of Steel supported the proposal indicated in the agenda. After discussions, it was clarified that the gas availability has not increased as such and the proposal has been suggested as a measure of ensuring better utilisation of gas particularly in view of the experience of the simultaneous shut down of fertiliser plants during the month of April 2000. It was agreed that a separate dialogue would be held between the Dept. of Fertilisers and ONGC/GAIL regarding the additional requirement of the fertiliser sector. The representative of the Planning Commission indicated that to the extent the fallback allocation is converted to firm, the supplies would need to be cut prorata between the existing consumers ex-Hazira and along HBJ system.
>
> "9.2 After discussions, the proposal of GAIL to convert the fallback allocation of M/s Essar Steel Ltd., and Reliance Industries Ltd., to the extent of 50% (i.e. 0.70 MMSCMD and 0.40 MMSCMD respectively) into firm allocation was agreed to subject to both these consumes paying the HBJ transportation charges for the gas supplied against the proposed conversion of fallback to firm allocation."

3.38 Ministry of Petroleum and Natural Gas issued a letter dated 5.6.2000 to the petitioner conveying the direction of Government of India to the conversion of fallback allocation to the extent of 0.70 out of 1.40 MMSCMD of natural gas to petitioner for their existing plant at Hazira subject to the conditions that (i) the petitioner shall pay HBJ transportation charges and (ii) that the petitioner and GAIL will enter an agreement within 60 days from the date of issue of the said letter. In reply dated 13.6.2000 the petitioner accepted the firm allocation of gas to the extent of 0.70 MMSCMD and reiterated their contention that transportation charges are not leviable in the case of the petitioner since the gas is being transported from landfall point and requested the Ministry to advise GAIL and further stated that in the

meantime petitioner shall continue to pay the transportation charges against the supply of gas pending final settlement in the matter. The respondent no.3 has written a letter dated 29.6.2000 to the petitioner regarding allocation of 0.70 MMSCMD on firm basis stating as under:

> "Out of the total firm allocation of 1.53 MMSCMD, the supply of 0.83 MMSCMD (0.49 MMSCMD plus 0.34 MMSCMD) shall continue to be available as per contract dated 24.01.1990, indenture dated 01.01.1993, and supplementary agreements dated 17.07.96, 25.01.2000 and 28.04.2000. Supply of gas against the balance firm allocation of 0.70 MMSCMD shall be at a rate applicable to the consumers located along HBJ pipeline including transportation charges, as are applicable from time to time, which is presently Rs.1150 per 1000 SCM and Essar Steel Ltd., agree that the same shall not be the subject of any dispute whatsoever."

3.39 Thereafter GAIL has written a letter dated 31.7.2000 to the Ministry of Petroleum referring to letters from Ministry of Petroleum dated 21.05.1999 and 05.07.1999, meetings of the Board of GAIL held on 28.07.1999, 31.08.1999 and 15.10.1999, and GAIL's letter dated 23.09.1999 and Ministry's letter dated 20.10.1999 and requesting for expeditious decision in the matter and highlighting the fact that Rs.83.47 crores are outstanding from the petitioner.

3.40 In response to that Ministry of Petroleum has written letter dated 14.8.2000 to GAIL stating that the Ministry of Law has supported the view of the Ministry of Petroleum expressed vide letter dated 05.07.1999 and has opined that "Monies paid when not due must in law and equity be refunded and Public Sector Undertakings must observe higher rules of morality than others." In the said letter it was further stated as under:

> "In the circumstances, GAIL may consider the entire matter in their Board meeting based on the view of the Law Ministry and if no satisfactory resolution is arrived at then GAIL may settle the matter through arbitration."

3.41 The gas supply agreement dated 24.01.1990 expired on 30.4.2000. Supplementary agreements extending the original agreement for limited periods were entered into on 24.01.2000 (Supplementary Agreement-I), 28.04.2000 (Supplementary Agreement-II), 01.08.2000 (Supplementary Agreement III), 31.10.2000 (Supplementary Agreement-IV), and the fifth Supplementary Agreement dated 31.01.2001 which has been subsequently extended further. The petitioner wrote letter dated 12.2.2001 to the Ministry of Petroleum pointing out the notice from GAIL for stoppage of gas supply to their steel complex at Hazira and requesting the Ministry of Petroleum to advise GAIL not to disconnect the supply of gas. Thereupon Ministry of Petroleum has written a letter dated 16.3.2001 to GAIL as under:

> "In this connection, it is once again reiterated that the Board of Directors of GAIL should consider the matter and take an appropriate view. If no solution emerges, then arbitration route should be resorted to settle the matter.
>
> It is further clarified that the opinion of the Law Ministry communicated vide the earlier letter of this Ministry dated 14.08.2000, should not be construed as a direction to the Board of Directors.
>
> GAIL may take early action in the above matter under intimation to this Ministry."

3.42 Thus, it was reiterated that appropriate view should be taken and if no solution emerged, arbitration route should be resorted to settle the matter. It appears that the Government has at no point of time reviewed its decision on committee's

recommendation that transportation charges is not payable by the petitioner. Thereafter the petitioner obtained a certificate from Chartered Accountant S. Gandhi & Associates, Surat opining that Rs.122.45 crores has been excess billed on the petitioner. The petitioner has written a letter dated 27.3.2001 to GAIL stating that the claim of GAIL for Rs.116 crores needs correction on the ground of [a] non applicability of transportation charges, [b] discount on excess supplies, [c] non-applicability of metering charges under contract dated 01.01.1993 and [d] non applicability of sales tax on transportation charges. The respondent no.3 rejected the said representation by letter dated 29.3.2001 made by the petitioner and direct the petitioner to pay Rs.120,65,62,976/- and open Letter of Credit of Rs.1385.58 lacs, failing which action would be taken against the petitioner. In pursuance of the same the petitioner made a representation dated 9.4.2001 to the Chairman of GAIL reiterating the aforesaid grounds. The petitioner also made a representation to Hon'ble Minister, Ministry of Petroleum, Government of India enclosing therewith the letter dated 9.4.2001 addressed to the Chairman, GAIL. According to the respondent, the outstanding dues of the petitioner was Rs.124.55 crores.

3.43 GAIL issued a notice dated 1.5.2001 to the petitioner calling upon the petitioner to pay Rs.124.56 crores by 8.5.2001, failing which gas supply to the petitioner company would be disconnected with effect from 6 hrs of 9.5.2001. In pursuance of the said notice the petitioner approached this Court by way of filing the present petition for the reliefs as stated hereinabove.

3.44 In this petition learned Single Judge had passed an interim order directing for

continuance of the supply of gas subject to giving bank guarantee for arrears of transport charges amounting to Rs.120 crores. The petitioner has thereafter filed Letters Patent Appeal No.1225/2004 before this Court which came to be dismissed. Against the said decision the petitioner had approached Hon'ble Supreme Court by way of filing Civil Appeal No.7956/2004. The Hon'ble Supreme Court disposed of the said appeal vide order dated 7th December 2004 by giving the following directions:

> "Having regard to the facts and circumstances of the case, we direct the appellant to make a further payment of a sum of Rs.40 crores towards the alleged arrears of transport charges on or before 6.1.2005 to the respondent nos.2, 3 and 4. If this amount is not paid on or before 6.1.2005 the respondents would be at liberty to stop the supply of natural gas to the appellant. We hope that the High Court will consider the pending writ petition at an early date and dispose it in accordance with law. The payment, if any, made by the appellants, would be without prejudice to the contentions raised by the appellant and will be subject to the final result of the writ petition."

3.45 Before proceeding further, it is required to be noted two communications were issued by GAIL to the petitioner. In the letter dated 8.11.2001 GAIL has stated as under:

> "The gas supply contract for your domestic unit, which expired on 30.09.2001 may be considered for extension/renewal subject to the following:
>
> M/s Essar Steel Limited (ESL):
>
> i) Shall withdraw the writ petition pending before the Hon'ble High Court of Gujarat at Ahmedabad, unconditionally, recognizing GAIL's in principle right to claim transportation/service charges as provided in contract signed between GAIL and ESL for supply of gas to their domestic unit.
>
> ii) Make arrangement for payment of all outstanding dues towards price of gas as well as transportation/service charges and other charges payable to GAIL, uptill the date of extension/renewal of the contract."

Similarly in the letter dated 15.2.2003 GAIL has stated as under:

This refers to your letter dated 11th December 2002 regarding extension/renewal of gas supply contract for your domestic and export oriented unit at Hazira.

In this regard we reiterate the communication dt.08.11.2001 to you that gas supply contract to your above units shall be considered for extension/renewal on your compliance in the following:

(iii) Essar Steel Ltd. (ESL) to withdraw Writ Petition before Hon'ble High Court at Ahmedabad, unconditionally, recognizing GAIL's in principle right to claim transportation/service charges as provided in contract signed between GAIL and ESL.

(iv) To deposit all outstanding dues toward price of gas as well as transportation charges and other charges as payable to GAIL.

You are requested to take necessary action in the above and confirm for our initiating appropriate action for extension/renewal of the contract as stated above."

4.0 Mr. K.S. Nanavati, Senior Advocate, appearing for the petitioner company has raised the following contentions:

I. Levy of Transportation charge levied by GAIL from the petitioner is arbitrary, unreasonable and unauthorized.

II GAIL has arbitrarily and unreasonably, while implementing the Price Orders and while giving effect to various contracts, wrongly withheld the benefit of 15% discount for supply of gas on fallback basis which is due and payable to the petitioner.

III The action of GAIL demanding and seeking to recover metering charges

from the petitioner company in respect of supply of gas under the contract dated 01.01.1993 is illegal, unauthorized as being contrary to the pricing orders dated 31.12.1991.

4.1 Mr. Nanavati advanced the following arguments to substantiate his contentions:

4.2 Mr. Nanavati submitted that natural gas is a “petroleum product” which needs to be regulated by the Union of India and natural gas being a “petroleum product” it falls within the scope and ambit of the Essential Commodities Act. Mr. Nanavati has pointed out that various pricing orders fixing the price of natural gas were issued by the Government of India in exercise of power under section 3 of the Essential Commodities Act and therefore GAIL has no right to charge and recover more than the price specified in the pricing order. He submitted that such action on the part of GAIL is unlawful and arbitrary.

4.3 Mr. Nanavati submitted that GAIL was established by Government of India and till that time supply of gas was made by ONGC to various consumers at a negotiated price between the supplier and the buyer/consumer. With effect from 1986 a conscious decision was taken by the Government of India that the price of natural gas supply would be fixed by the Government and therefore the concept of “negotiated price” was done away with, and government control by way of fixation of price for supply of gas was introduced for the first time in 1987 by issuing a price order dated 30.1.1987. He submitted that GAIL being the agency and instrumentality

of Government of India, is a “State” within the meaning of Article 12 and is amenable to the writ jurisdiction of this Court.

4.4 Mr.Nanavati submitted that GAIL has, while performing the functions of ONGC and which were earlier performed by the Government of India, sought to demand Ex-HBJ price from the petitioner company dehors the Price Orders issued by the Government of India and has thus acted unfairly, arbitrarily and unreasonably under the said contracts for supply of gas by charging prices beyond those fixed by the Pricing Orders which action is per se unreasonable as being violative of Article 14 of the Constitution of India.

4.5 Mr. Nanavati submitted that till 1986, supplies of gas were made by ONGC at negotiated prices. Therefore the Government of India decided to fix the prices for supply of gas so as to bring uniformity in the said pricing structure and as a result thereof the Price Order was introduced for the first time by the Government of India being Price Order dated 30.1.1987. Such Price Order was made applicable with immediate effect. He submitted that GAIL being merely a marketing agent to which the Government of India transferred the gas marketing function from ONGC, has no independent right or authority to charge and recover prices beyond those specified and permitted in the Pricing Order. According to Mr. Nanavati, GAIL has sought to ignore the said Pricing Orders and sought to charge the price for supply of gas beyond the said prices fixed by the Government of India vide Pricing Orders.

4.6 In this regard Mr. Nanavati has relied upon a decision in the case of O & N G.

Commission Vs. Association of N.G.C. Industries of Gujarat, reported in AIR 1990 SC 1851 (=1990 Supp. SCC 397, JT 1990(2) SC 516, 1990(1) Scale 900, 1990(3) SCR 157) wherein the Supreme Court held that the jurisdiction for fixation of prices came to be vested with the Government of India in 1987. He also relied upon the contract dated 24.1.1990 at Annexure-II wherein it is clearly stated that the price of gas will change as and when the Government changes the price. He further relied upon clause (i) of the said contract which provided that "the price of gas shall be as per decision of the Government of India from time to time." Mr. Nanavati further pointed out clause (i) of Article-V of 1991 Indenture which provided that "The price of gas shall be as per decision of Government of India from time to time. Till decision of the Government is received, the buyer shall pay at the rate of Rs.1400 per 1000 SCM of gas which shall be adjusted on receipt of Government of India's decision in this behalf. This price shall be charged for the entire quantity of the gas to be supplied under this contract including in excess of 14,00,000 M3/day."

4.7 Referring to Pricing Order dated 31.12.1991 he submitted that it is provided therein that the price of onshore gas and for offshore gas at landfall point, will be Rs.1550/1000 cu.mts.". Mr. Nanavati has also relied upon contract dated 1.1.1993, contract dated 17.7.1996 to show that the buyer shall have to pay to the seller the price determined by Government Pricing Orders. Referring to order dated 20.5.1996 Mr. Nanavati submitted that GAIL has no independent power of allocation. In Price Order of 1997 dated 18.9.1997 it is stipulated that for all subsequent quarters upto 31.3.2000, GAIL shall follow the methodology and notify the price for each quarter. Mr. Nanavati submitted that despite government control in matters of prices, the

invoices were raised by GAIL continuing to charge Ex-HBJ price which was clearly dehors the 1997 Price Order. He submitted that the concept of Ex-HBJ price was abolished vide pricing order dated 18.9.1997 based upon Shanker Committee's report. In spite of this GAIL showed nil transportation charge in its invoices and added the Ex-HBJ price in the price for supply of gas.

4.8 Referring to letter dated 26.3.1998 Mr. Nanavati submitted that GAIL had conveyed to the petitioner that its bills are being raised as per supplementary agreement dated 17.7.1996. According to him the said action was unreasonable since even the agreement dated 17.7.1996 recorded that the payment of Ex-HBJ price by Essar shall be till the new Price Order is declared.

4.9 Mr. Nanavati submitted a Committee constituted by the Government in its report dated 4.5.1999 recommended that with effect from 1.10.1997, GAIL is not entitled to charge Ex-HBJ price from the petitioner since the petitioner is not an HBJ consumer and since the said levy is not permissible as per the new Pricing Order. The Government of India by various orders conveyed that (i) GAIL is not entitled to charge transportation charges from the petitioner and that (ii) the excess amount collected must be refunded. He submitted that in spite of this position GAIL has sought to disconnect the supply of gas for alleged non-payment of the outstanding dues which demand is substantially in respect of Ex-HBJ pipeline price i.e. transportation charge.

4.10 Mr. Nanavati has relied upon the affidavit in reply filed on behalf of Union of

India wherein it is stated that the price of natural gas is fixed by the Union of India with the concurrence of other Ministries and allocation of gas is made on the recommendation of GLC. He has placed reliance upon paragraphs 5, 6 and 7 and submitted that they have not denied the contention of the petitioner that the Pricing Order issued from time to time by the Government of India are binding on the Government Oil Companies such as GAIL, OIL, ONGC.

4.11 In this connection Mr. Nanavati has relied upon a decision in the case of Naseem Bano Vs. State of U.P. and others, reported in AIR 1993 SC 2592 (= 1993 Supp. (4) SCC page 46, JT 1993(4) SC 553, 1993(3) Scale 431). He submitted that the denial by GAIL with regard to the binding nature of pricing orders is of no consequence. According to him GAIL's contention that the Pricing Orders are only in the nature of communication or that the same do not prohibit GAIL for charging extra charges beyond the Pricing Orders is not tenable since it is for the author of the pricing orders viz. the Government of India to clarify the binding nature of the said pricing orders and not for GAIL who is merely a marketing agent of the Union of India.

4.12 Mr. Nanavati submitted that in view of the aforesaid facts, observations of the Hon'ble Supreme Court in ONGC's case, the various clauses of various contracts, the contracts of the binding Price Orders and the Government of India's Orders dated 21.5.1999 and 5.7.1999, the GAIL a "State" within the meaning of Article 12 of the Constitution of India, there is no substance in the contentions of the respondent raised in the affidavit in reply that (i) there is an alternative remedy available to the

petitioner by way of arbitration; (ii) the marketing activity for supply of natural gas is a pure commercial business activity; (iii) the Price Orders are only in the nature of communications and not binding and cannot override the contracts, (iv) the orders of Government of India dated 21.5.1999 and 5.7.1999 are not binding, (v) the contracts in question are “commercial” contracts and, therefore, GAIL is at liberty to charge such price for supply of gas as it deems fit and that (v) the transportation charge as levied for supply on firm basis to petitioner is at the cost of supply of gas to the Ex-HBJ consumer”.

4.13 He submitted that petitioner is not an HBJ pipeline gas consumer but has been taking delivery of gas from the delivery point i.e. the landfall point from the premises of ONGC and, therefore, transporting the same through its own pipeline (Owned, constructed and maintained by it) over a distance of 18 Kms to its manufacturing plant at Hazira and which pipeline was laid down at a cost of Rs.15 crores. The said demand of transportation charges though gas is not transported to the petitioner by GAIL is, therefore, wholly unreasonable and irrational, which is only a marketing agent of the Union of India.

4.14 Mr. Nanavati submitted that even otherwise, GAIL’s contention of the contracts in question being pure commercial contracts and that GAIL is at liberty to charge its own price for supply of gas even beyond the Pricing Orders is clearly an attempt to mislead this Court and runs counter to the Government of India’s interpretation on the impact and effect of the said Price Orders as well as the decision of the Supreme Court in the case of ONGC (supra), reported in AIR 1990

SC 1851. In the said decision it is clearly laid down that the jurisdiction for fixation of prices came to be vested with the Government of India in 1987. He, therefore, submitted that with effect from1987 the concept of freely negotiated price in matters of supply of natural gas was done away with and hence GAIL still cannot continue to contend that the Price Orders are not binding or that the contracts are commercial contracts having an element of freely negotiated price.

4.15 Mr. Nanavati has next contended that the action of GAIL of demanding the Ex-HBJ price from the petitioner company despite the petitioner company being an Ex-Hazira consumer is ex-facie unreasonable, irrational, discriminatory and violative of Article 14 of the Constitution of India. He submitted that the Pricing Order dated 18.09.1997 provides for uniform consumer price for all the consumers and divides the consumers into two classes, viz. those who are supplied gas through and along the HBJ pipeline and the non HBJ consumers or the rest of the consumers. Clause (iv) of the Price Order provides for recovery of fixed transportation charges from the consumers who are getting their supply from GAIL along HBJ pipeline. He submitted that admittedly the petitioner is not getting supply of gas through or along the HBJ pipeline. The petitioner company belongs to a separate class of non-HBJ consumers from whom transportation charges can be demanded/recovered only if transportation is done at the cost of transporting the same is incurred by GAIL for supplying the gas through its own pipeline to the Non-HBJ consumers. He also pointed that the Price Order dated 18.9.1997 read with Price Order dated 30.9.1997 mentions gas delivery to landfall point and the petitioner company takes delivery of gas at landfall point, while price that is charged from the petitioner company is that of delivery of gas

along the HBJ pipeline. He has also pointed out various invoices wherein GAIL has demanded the price of Rs.3300 per 1000 MMSCMD (being Rs.2150 + Rs.1150) in respect of supply of gas of 0.35 MMSCMD (on firm basis) as well as supplies made on fallback basis or on ad hoc basis from July 1997; whereas the price fixed under the Pricing Order dated 18.9.1997 by the Government for non-HBJ consumers is Rs.2150/- per 1000 MMSCMD. The same is approved by the Central Government. He, therefore, submitted that GAIL has deceptively loaded the transportation charge on to the basic price so that the invoice would show the transportation charge as "NIL", while the price that is actually charged from the petitioner company is the basic price plus transportation charge.

4.16 Mr. Nanavati next contended that the demand and recovery of higher price i.e.Ex-HBJ price from the petitioner company who belongs to a class of non-HBJ consumers clearly amounts to treating unequals as equals. According to him, from the period 17.7.1996 onwards, GAIL has sought to levy and recover HBJ transportation charge from the petitioner company though the petitioner Company is a non-HBJ consumer. Thus, GAIL has resorted to hostile discrimination between the petitioner company and rest of the non-HBJ consumers and has on the other hand sought to club the petitioner company with the HBJ consumers. He submitted that not a single ounce of gas has been supplied to the petitioner company by GAIL by transporting the same to the premises of the petitioner company.

4.17 Mr. Nanavati further contended that GAIL's action of demanding the Ex-HBJ price/HBJ transportation charge beyond the prescribed rate as stipulated in the

Pricing Order issued by the Government of India from time to time is patently irrational and unauthorized. He submitted that GAIL, as a marketing agent of the Government, cannot recover the higher price than the price fixed by the Pricing Order either in the name of HBJ transportation charges or otherwise unless the Government of India specifically permits such additional price vide its specific Price Orders. He submitted that doing so would amount to charging an additional price in the guise of HBJ transportation charges and would be clearly contrary to the pricing order and would amount to permitting GAIL to alter/amend the pricing order issued by the Government of India which power has not been delegated by the Government of India to GAIL or to any other oil company.

4.18 Mr. Nanavati contended that the action of GAIL of seeking to recover the Ex-HBJ price from the petitioner Company for supply of gas from the landfall point at Hazira is not only in violation of the Price Orders, but also runs counter to the Government of India's decision as conveyed to GAIL vide the Government of India's letter dated 21.5.1999 and 5.7.1999 wherein it has been categorically mentioned that the price must be charged by GAIL in accordance with the Pricing Order and that the Ex-HBJ price cannot be levied from Essar who is an Ex-Hazira consumer and whose plant is located at Hazira i.e. at landfall point. He submitted that the directions issued by the Government of India vide letters dated 5.7.1999 and 14.8.2000 are on the basis of the report dated 4.5.1999 of the Committee specially constituted by the Government to submits its report on the basis of the representations made by the petitioner and which directions of the Government of India are, therefore, binding on GAIL, being the directions given by the Government of India to its agent i.e. GAIL.

4.19 Mr. Nanavati contended that the action of GAIL of seeking to charge price in addition to the Government of India's Price Order runs counter to the well settled doctrine of promissory estoppel and legitimate expectation. He further submitted that GAIL is not justified in demanding Ex-HBJ price from the petitioner company on the purported ground of the same being permissible under the contract dated 17.7.1996. He submitted that in any case the right of GAIL to recover the Ex-HBJ price under the said agreement dated 17.7.1996 was only in respect of 0.35 quantity converted from fallback to firm basis and that too till the declaration of the new Price Order or instruction or directive of the Government of India.

4.20 Mr. Nanavati Submitted that NTPC is not a landfall consumer but is an HBJ consumer and its contract specifically stipulated that the gas would be transported from HBJ line to NTPC by way of pipeline owned,operated and maintained by GAIL. In spite of this GAIL sought to treat the petitioner as that of NTPC . He further submitted that Reliance Industries which is similarly situated and is also an Ex-Hazira consumer was not billed at the Ex-HBJ pipeline price during July 1996 to May 1998 for ad hoc supplies. He therefore submitted that there is clear discrimination against the petitioner company.

4.21 Mr. Nanavati further contended that GAIL has sought to falsely justify the impugned demand/levy of transportation charge by contending before this Court that the said quantities of gas were supplied to petitioner company after 17.7.1996 at the cost of the HBJ consumers since the gas committed for HBJ consumers was diverted

to the petitioner company and, therefore, the levy of Ex-HBJ price from the petitioner company is justified. He submitted that the said contention of diversion of 0.35 MMSCMD and ad hoc supplies to the petitioner company from and at the cost of HBJ consumers is patently disbelievable and is even otherwise is false and contrary to the documents on record.

4.22 Mr. Nanavati contended that GAIL has sought to approbate and reprobate before this Court since on one hand it has contended at page 372 in its affidavit in sur rejoinder that “the price of goods and the taxes and other levies thereon and cost of transportation thereof cannot be mixed up, all these components being independent of each other and explicitly provided for. On the other hand, GAIL has itself with a view to take undue advantage of the contract dated 17.7.1996 included the Ex-HBJ transportation charge in the basic price and shown the transportation charge as NIL while raising the invoices during the period October 1997 onwards. Thus, GAIL has not practiced what it has sought to contend before this Court and its affidavit.

4.23 Mr. Nanavati submitted that the entire controversy is only in respect of the quantity. After the new Pricing Order came into force w.e.f. 1.10.1997, petitioner raised dispute regarding right of GAIL to demand the price which also included HBA transportation charges. It was this dispute (dispute regarding payability of transportation charges in respect of supplies of 0.35 MMSCMD, fall back and ad hoc supplies the quantity covered by 17.7.1996 agreement) which eventually was referred for decision by the Government of India after accepting the report of the

committee gave directions in terms of the Committee's report. He submitted that the petitioner is only seeking implementation of these orders of the Government in the present petition.

4.24 Mr. Nanavati contended that the documents on record, read as a whole, clearly establish that Government of India had clearly and unequivocally declared that HBJ transportation charge cannot be demanded from the petitioner unless it is specifically directed by the Central Government.

4.25 After referring to various Pricing Orders and the contracts, Mr.Nanavati submitted that GAIL has acted arbitrarily and unreasonably, while implementing the Price Orders and while giving effect to the various contracts, wrongly withheld the benefit of 15% discount for supply of gas on fallback basis which is due and payable to the petitioner. He submitted that the action of the respondent nos.3 to 5 of withholding and denying the benefit of 15% discount as available under the said Price Order as well as the contracts in question is patently illegal and arbitrary. The respondent no.3 GAIL being a Government of India undertaking is bound to honour the declarations of pricing policies as issued from time to time by the Government of India by way of Pricing orders and any action of GAIL which is dehors the said pricing order is amenable to judicial review and deserves to be set aside. The 15% discount is given keeping in mind the fact that wastage can be avoided as otherwise the same would have to be burnt away by ONGC. Therefore, this policy was introduced by the Government only with a view to getting maximum use of Gas.

4.26 Mr. Nanavati lastly contended that the action of GAIL demanding and seeking to recover metering charges from the petitioner company in respect of the supply of gas under the contract dated 1.1.1993 is illegal, unauthorized as being contrary to the pricing orders dated 31.12.1991 and continuation thereof and, therefore, being contrary to 18.9.1997 Price Order is clearly abuse of monopolistic powers and discriminatory.

4.27 Subsequently the petitioner has amended the prayer which reads as under:

> "A-1 Your Lordships may be pleased to issue a writ of mandamus or certiorari or a writ in the nature of mandamus or certiorari quashing and setting aside the impugned disconnection notice dated 1.5.2001 at Annexure W-3 hereto".

5.0 Mr. Nanavati has relied upon a decision in the case of GSFC Vs. M/s Lotus Hotels Private Limited, reported in AIR 1983 SC 848 (=1983(3) SCC 379, 1983(1) Scale 584) wherein it has been held that the principle of promissory estoppel would certainly estop the Corporation from backing out of its obligation arising from a solemn promise made by it to the respondent. The respondent acting upon the solemn promise made by the appellant incurred huge expenditure and if the appellant is held to its promise, the respondent would be put in a very disadvantageous position.

5.1 Mr. Nanavati relied upon a decision in the case of Mahabir Auto Stores Vs. IOC, reported in AIR 1990 SC 1031 (=1990(3) SCC 752, 1990(1) Scale 410, 1990(1)

SCR 818) wherein, while interpreting Article 14, it is held that even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review under touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination. Paragraphs 12, 18, 20 and 21 of the said decision read as under:

> "12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, action uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radha Krishna Agarwal Vs. State of Bihar. It appears to us, at the outset, that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. see Radha Krishna Agarwal Vs. State of Bihar at p.462, but article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever by the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet

the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. I this connection reference may be made to E.P. Royappa Vs. State of Tamil Nadu, Maneka Gandhi Vs. Union of India, Ajay Hasia Vs. Khalid Mujib Sehravardi, R.D. Shetty Vs. International Airport Authority of India and also Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case." (emphasis supplied).

"18. Having considered the facts and circumstances of the case and the nature of the contentions and the dealing between the parties and in view of the present state of law, we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the appellant-firm herein on alleged change of policy and on that basis action to seek to bring to an end to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence."

> "20. Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the state enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the appellant should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. we must, however, evolve such process which will work" (emphasis supplied).
>
> "21. Therefore, we direct that the case of the appellants be put to the respondents and let the respondent authorities consider afresh the submissions made by the appellant-firm, namely, that the existing arrangement amounts to a contract by which the distributorship was continued in case of the appellant-firm without any formal contract and further that the new policy of the government introduced in December 1982 would not cover the appellant firm and as such the appellant should continue. It will be sufficient, having regard to the nature of the claims, for the respondent authority to consider this aspect after taking the appellant-firm into confidence on this aspect. Nothing further need be stated or required to be done and we give no directions as to whether reasons should be recorded or hereinafter should be given. In the facts and circumstances, it is not necessary to give oral hearing or record the reasons as such for the decision. The decision should be based on fair play, equity and consideration by an institution like OIC. It must act fairly."

5.2 Mr. Nanavati has relied upon a decision in the case of Kum. Shrilekha Vidyarthi Vs. State of U.P. and others, reported in AIR 1991 SC 537 (=1991(1) SCC 712, 1990(2) Scale 561, JT 1990 SC 211, 1990 Supp(1) SCR 625). The relevant paragraphs read as under:

> "21. The Preamble of the Constitution of India resolves to secure to all its citizens Justice, social, economic and political; and equality of status and opportunity. Every State action must be aimed at achieving this goal. Part IV of the Constitution contains "Directive Principles of State Policy" which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is

complementary to individual fundamental rights guaranteed in Part III for protection against State action, to realise the vision in the Preamble. This being the philosophy of the Constitution, can it be said that it contemplates exclusion of Art.14 – non-arbitrariness which is basic to rule of law – from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the Constitutional Scheme to accept the argument of exclusion of Art.14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

22. There is an obvious difference i the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Art.14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Art.14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions."

"23. Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Art.14 of the Constitution, there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons."

"24. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfill the

obligation of Art.14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Art.14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity."

"26. A useful treatment of the subject is to be found in 91990) 106 LQR at pages 277 to 292 in an article "Judicial Review and Contractual Powers of Public Authorities". The conclusion drawn in the article on the basis of recent English decisions is that `public law principles designed to protect the citizens should apply because of the public nature of the body, and they may have some role in protecting the public interest'. The trend now is towards judicial review of contractual powers and the other activities of the Government. Reference is made also to the recent decision of the Court of Appeal in Jones V. Swansea City Council, (1990) 1 WLR 54, where the Court's clear inclination to the view that contractual powers should generally be reviewable is indicated, even though the Court of Appeal faltered at the last step and refrained from saying so. It is significant to note that emphasis now is on reviewability of every State action because it stems not from the nature of function, but from the public nature of the body exercising that function; and all powers possessed by a public authority, howsoever conferred, are possessed `solely in order that it may sue them for the public good'. The only exception limiting the same is to be found in specific cases where such exclusion may be desirable for strong reasons of public policy. This, however, does not justify exclusion of reviewability in the contractual field involving the State since it is no longer a mere private activity to be excluded from public view or scrutiny.

"28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Art.14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Art.14."

"31. It is this aspect which has been considered at length by Sabyasachi Mukharji, J. (as the learned Chief Justice then was) in Dwarkadas Marfatia's case (AIR 1989 SC 1642) (supra) even though, that was a case of statutory exemption granted under the Rent Act to an instrumentality of the State and it was in that context that the exercise of power to terminate the contractual tenancy was examined. All the same, without going into the question whether the obligation of the instrumentality to act in pursuance of public purpose, was a public law purpose or private law purpose, it was held that the obligation to act in pursuance of public purpose was alone sufficient to attract Art.14. It was held that there was an implied obligation in respect of the dealings with the tenants/occupants of the authority to act in public interest/purpose. It was emphasised that every State action has to be for a public purpose and must promote public benefit. Referring to some earlier decisions, it was reiterated that all State actions `whatever their mien" are amenable to constitutional limitations, the alternative being to permit them 1to flourish as an imperium in imperio'. It was pointed out that `governmental policy would be invalid as lacking in public interest, unreasonable or contrary to the professed standards', if it suffers from this vice. It was stated that every State action must be reasonable and in public interest and an infraction of that duty is amenable to judicial review. The extent of permissible judicial review was indicated by saying that `actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose'. It is sufficient to quote from the judgement of Mukharji, J. (as the learned Chief Justice then was) the following extract (at p.1648 of AIR):

"... Where there is arbitrariness in State action, Art.14 springs in and judicial review strikes such an action down. Every action of the executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Art.14 ..."

This decision clearly shows that no doubt was entertained about the applicability of Art.14 of the Constitution to an action of the State or its instrumentality, even where the action was taken under the terms of a contract of tenancy which alone applied by virtue of the exemption granted under the Rent act excluding the applicability of the provisions thereof."

"35. It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Art.14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind."

> "36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that `be you ever so high, the laws are above you". This is what men in power must remember, always."
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> "48. In our view, bringing the State activity in contractual matters also within the purview of judicial review is inevitable and is a logical corollary to the stage already reached in the decisions of this Court so far. Having fortunately reached this point, we should not now turn back or take a turn in a different direction or merely stop there. In our opinion, two recent decisions in M/s Dwarkadas Marfatia and Sons (AIR1989 SC 1642) (supra) and Mahabir Auto Stores (AIR 1990 SC 1031) (supra) also lead in the same direction without saying so in clear terms. This appears to be also the trend of the recent English decisions. It is in consonance with our commitment to openness which implies scrutiny of every State action to provide an effective check against arbitrariness and abuse of power. We would much rather be wrong in saying so rather than be wrong in not saying so. Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary, in whatever sphere, must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all power must be for public good instead of being an abuse of the power."

5.3 Mr. Nanavati has relied upon a decision of this Court in the case of Narmada Cement Company Vs. State of Gujarat & Anr, reported in 1997(2) GLR 1386 (=1997(1) GCD 807) wherein it has been held that "the position of law laid down by the Hon'ble Supreme Court is that even in respect of contractual obligations of the parties, the State is not relieved of its obligations of complying with the provisions of Article 14 of the Constitution i.e. to act justly, fairly and reasonably. Applying to the facts of the present case, if it is found that the impugned act of the respondents is

beyond the treatment of Clause 26 of the agreement of 1990-91, the petition is maintainable, otherwise not." This decision has followed the decision in the case of Kum. Shrilekha Vidyarthi (supra).

5.4 Mr. Nanavati has also relied upon a decision in the case of M.S. Desai & Co. Vs. Hindustan Petroleum Corporation Limited, reported in AIR 1987 Guj. 19 (=1987(1) GLR 375, 1986 GLH 1170) wherein it has been held that "The respondent is admittedly solely owned by the Central Government. The respondent is discharging Government functions. The petroleum products are monopoly products, procurement and distribution whereof are within the direct control of the Petroleum Ministry of the Central Government. Originally, these functions were discharged by the department of the Government viz., Ministry of Petroleum and thereafter they were transferred by floating wholly owned Government company under the Indian Companies Act, 1956. It also cannot be disputed that the entire working capital of the respondent Corporation is being provided by the Central Government. Thus, the respondent Corporation is owned and controlled by the Central Government. It is, therefore, necessarily an instrumentality or limb or agency of the Central Government. As it is an authority owned and controlled by the Central Government, it cannot but be styled as State within the meaning of Article 12 of the Constitution. Ultimately it was held in the said decision that such a type of challenge mounted against the alleged arbitrary action of the authority which is a State within the meaning of Article 12 of the Constitution, cannot be shut out from the scrutiny of the Court under Article 226 of the Constitution. Such a challenge cannot be said to be raising purely a question of a breach of contract based only on the contractual rights

and obligations and which would be foreign to the scope of proceedings under Article 226 of the Constitution.

5.5 Mr. Nanavati has relied upon a decision in the case of Style Dress Land & Ors. Vs. Union Territory, Chandigarh & Ors, reported in AIR 1999 SC 3678 (1999(7) SCC page 89, JT 1999(6) SC 67, 1999(5) scale 74) wherein it has been held that the Government cannot act like a private individual in imposing the conditions solely with the object of extracting profits from its lessees. Governmental actions are required to be based on standards which are not arbitrary or unauthorized.

5.6 Mr. Nanavati has next relied upon a decision in the case of ABL International Limited & Anr Vs. Export Credit Guarantee Corporation of India Limited, reported in 2003 (10) JT page 300 (=2004(3) SCC 553, 2003(10) Scale 815, 2004(118) Comp. Case 213) wherein it has been held that “the use of the words “any reason whatsoever” in the amended clause includes the reason of refusal by the appellants to accept the goods offered in barter. ... We have to come to the conclusion that the amended clause 6 of the agreement between the exporter and the importer on the face of it does not give room for a second or another construction than the one already accepted by us. It was further held that “We have already noted the decision of this Court which in clear terms have laid down that mere existence of disputed question of fact ipso facto does not prevent a writ Court from determining the disputed questions of fact, when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably in its contractual constitutional or statutory obligations, it really acts contrary to the constitutional

guarantee found in Article 14 of the Constitution. Thus, if we apply the above principle of applicability of Article 14 to the facts of this case, then we notice that the first respondent being an instrumentality of State and a monopoly body had to be approached by the appellants by compulsion to cover its exports risk. ... We are also of the considered opinion that the liability of the first respondent under the policy arose when the default of the export occurred and thereafter when Kazakhstan Government failed to fulfill its guarantee. There is no allegation that the contracts in question were obtained either by fraud or by misrepresentation. In such factual situation, we are of the opinion, the facts of this case do not and should not inhibit the High Court or this Court from granting the relief sought for by the petitioner.

5.7 The next decision relied upon by the learned counsel for the petitioner is in Special Reference No.1 of 2001 reported in 2004(4) SCC 489 (=JT 2004(3) SC 529, 2004(3) Scale 843) wherein it is held that the Gujarat Gas (Regulation of Transmission, supply & Distribution) act, 2001, so far as the provisions contained therein relating to the Natural Gas or liquefied Natural Gas (LNG) are concerned, is without any legislative competence and the Act is to that extent ultra vires of the Constitution.

5.8 Mr. Nanavati has relied upon a decision in the case of Nanalal Amardas Vs. State, reported in 1978(XIX) GLR 863 wherein it is held as under:

> "The day in and the day out, persons in the charge of the Administration go on shouting from the public platforms that there are delays in the disposal of the judicial business. But the Judiciary in the present set-up of things in the Nation, is not expected to reply to or retaliate such bald allegations and

> charges. The instant case constrained His Lordship to observe that very little assistance can be had from the State executive machinery. The cases of the Government many a time go by default and if proper assistance is rendered, the results adverse to the State can be avoided. In the instant case, for want of any counter allegations or denial, what has been stated by the petitioners as to the substratum of their case has to be accepted as true."

5.9 Mr. Nanavati has also relied upon a decision in the case of Naseem Bano Vs. State of U.P. and others, reported in AIR 1993 SC 2592 (=1993 Supp(4) SCC 46, JT 1993(4) SC 553, 1993(3) Scale 431) wherein it is held that if the averment made in writ petition is not controverted by the respondents, it should be presumed to have been admitted.

5.10 Mr. Nanavati has relied upon a decision in the case of in the case of Steel Authority of India Ltd. and others vs. National Union Waterfront Workers and others, reported in AIR 2001 SC 3527 (= 2001(7) SCC 1, JT 2001(7) SC 268, 2001(5) Scale 626, 2001 Supp.2 SCR 343) wherein the question with regard to appropriate government to raise dispute in respect of a government company and the jurisdiction of High Court in the matter of Contract Labour (Regulation and Abolition) Act, 1970 was considered.

5.11 Mr. Nanavati has relied upon a decision in the case of Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology and others, reported in 2002(5) SCC 111, JT 2002(4) SC 146, 2002(3) SCR 100 and 2002(3) Scale 638. He has placed reliance upon the observations made by the Apex Court in paragraphs 27, 40, 73 and 74 which read as under:

"27. Ramana was noted and quoted with approval in extenso and the tests propounded for determining as to when a Corporation can be said to be an instrumentality or agency of the Government therein were culled out and summarised as follows: (SCC p.737, para 9).

> "(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (SCC p.507, para 14).
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> (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (SCC p.508, para 15).
>
> (3) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State-conferred or State-protected (SCC p.508. para 15).
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> (4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p.508, para 15).
>
> (5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government (SCC p.509, para 16).
>
> (6) `Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government (SCC p.510, para 18)."

"40. The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a state within the meaning of Article 12. The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

"73. It will be useful to understand what the terms – instrumentality, agency and authorities mean before embarking upon a review of judicial decisions dealing with the principal issue which arises for our consideration.

74. Black's Law Dictionary (7th Edn.) defines “instrumentality” to mean “a meas or agency through which a function of another entity is accomplished, such as a branch of a governing body”. “Agency” is defined as:

> “A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions”.

Thus instrumentality and agency are the two terms which to some extent overlap in their meaning; “instrumentality” includes “means” also, which “agency” does not, in its meaning. “Quasi-governmental agency” is “a government-sponsored enterprise or corporation (sometimes called a government-controlled corporation)”. Authority, as Webster's Comprehensive Dictionary (International Edition) defines, is “the person or persons in whom government or command is vested; often in the plural”. The applicable meaning of the word “authority” given in Webster's Third New International Dictionary, is “a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue-producing public enterprise”. This was quoted with approval by the Constitution Bench in RSEB case wherein the Bench held: (AIR p.1862, para 5):

> “This dictionary meaning of the word `authority' is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions. The expression `other authorities' is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words `other authorities' are used in Article 12 of the Constitution.”

5.12 Mr. Nanavati has also relied upon a decision in the case of Mysore Paper Mills Ltd. Vs. Mysore Paper Mill Officers' Association and another, reported in AIR 2002 SC 609 (= (2002)2 SCC 167, 2002(1) SCR 37, JT 2002(1) 61, 2002(1) Scale 52. Mr. Nanavati relied upon paragraphs 11 and 12 of the said decision which read as under:

> “11. A careful consideration of the principles of law noticed super and the factual details not only found illustrated from the memorandum as well as articles of association of the appellant but enumerated from the day-today

running of the business and administration of the Company leave no room for any doubt as to the identity of the appellant-Company being "other authority" and consequently "the State" within the meaning of Article 12 of the Constitution of India. The said definition has a specific purpose and that is Part III of the Constitution, and not for making it a Government or department of the Government itself. This is the inevitable consequence of the "other authorities" being entities with independent status distinct form the State and this fact alone does not militate against such entities or institutions being agencies or instrumentalities to come under the net of Article 12 of the Constitution. The concept of instrumentality or agency of the Government is not to be confined to entities created under or which owes its origin to any particular statute or order but would really depend upon a combination of one or more of relevant factors, depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be, piercing the corporate veil of the entity concerned.(emphasis supplied)

12. The indisputable fact that the appellant-Company is a government company as envisaged in Section 617 attracting section 619 of the Companies Act, that more than 97% of the share capital has been contributed by the State Government and the financial institutions controlled and belonging to the Government of India on the security and undertaking of the State Government, that the amendments introduced to the Memorandum of Association in the year 1994 introducing Articles 5-A and 5-B, entrusts the appellant- Company with important public duties obligating to undertake , permit, sponsor rural development and for social and economic welfare of the people in rural areas by undertaking programmes to assist and promote activities for the growth of national economy which are akin and related to the public duties of the State, that out of 12 directors also are to be with the concurrence and nomination of the Government and the various other forms of supervision and control, as enumerated supra, will go to show that the State Government has deep and pervasive control of the appellant-Company and its day-to-day administration, and consequently confirm the position that the appellant-Company is nothing but an instrumentality and agency of the State Government and the physical form of the Company is merely a cloak or cover for the Government. Despite best and serious efforts made on behalf of the appellant, the decision under challenge has not been shown to suffer from any infirmity whatsoever, to call for interference in our hands.

5.13 Mr. Nanavati has relied upon a decision in the case of V.R. Potdar Vs. State, reported in AIR 1983 Bombay 76. wherein it is held that the rules made by the authorities have a statutory force and they are not mere guidelines or executive

instructions.

6.0 Mr. Dushyant Dave, learned Senior Counsel appearing for the respondents no.3 to 5 has raised the following preliminary contentions:

[A] The petition raises disputed question of fact and writ is not an appropriate remedy to decide disputed question of facts, more particularly when no issue of fundamental rights arises in the petition.

[B] The petition deserves to be dismissed as alternative efficacious remedy is available under the contract dated 1.1.1993 as well as under contract dated 17.7.1996 between the parties. He submitted that Article 13 of contract dated 1.1.1993 and Article 15 of the Agreement dated 24.1.1990 which would apply to the Supplementary Agreement of 17.7.1996 provide for Arbitration and therefore, since an alternative efficacious remedy is available, this petition is not maintainable. To support his contention Mr. Dave has relied upon a decision of the Supreme Court in the case of Renusagar Power Company Ltd. Vs. General Electric Company, reported in AIR 1985 SC 1156 (para 15-25, 39 and 40) (= 1984(4) SCC 679, 1985(1) SCR 432, 1984(2) Scale 321). He has also relied upon the letter by Ministry of Petroleum to GAIL dated 14.8.2000 and 16.3.2001.

[C] The present petition is not maintainable since the dispute raised in the present petition relates to terms of the contract. A contract does not become statutory simply because it has been awarded by a Government Corporation. The

contract is in respect of Commercial activity of GAIL and does not raise any issue of public law and dispute arising from such commercial activities of GAIL must be settled according to the Principles of Law of contract. The matter is squarely within the contractual field and writ Court is not a proper forum for resolution of the dispute. In the circumstances, the present petition deserves to be dismissed as involving contractual disputes.

6.1 Mr. Dave has relied upon clause 11.01 of the Supplementary Agreement entered into between the petitioner and GAIL for conversion of 0.35 MMSCMD from fallback allocation to firm basis. The said clause reads as under:

> "11.01 The buyer shall pay to the seller the present price of 1000 (One Thousand) Standard Cubic Meters of Gas as per Government Pricing Order No.L-12015/2/88-GP dated 31.12.1991 for 0.50 (Zero Point Five Zero) Million Standard Cubic Meters per day of gas. The buyer has further agreed to and shall pay for supply of gas in excess of 0.50 (Zero point Five Zero) Million Standard Cubic Meters per day at ex-HBJ price of gas as per the aforesaid Government Pricing Order. After the expiry of the period of Government Pricing order No.L-12015/2/88-GP dated 31.12.1991, seller shall fix the price of gas as per directive, instruction, order, etc. of Government of India which is likely to be market related in accordance with the current policy of liberalisation of Government of India and the buyer shall pay to the seller such price of gas. The price of gas is exclusive of Royalty, Taxes, Duties, and also other statutory levies as applicable at present or to be levied in future by the Central or State Government of Municipality or any other local body or bodies payable on sale of gas from ONGCL to the seller or on sale from seller to the buyer, and shall be borne by the buyer over and above the aforesaid price. Provided further that for supply of gas made by the seller to the buyer on fallback basis with effect from 16.5.1992, the price applicable shall be the full price of gas as applicable for gas supply made by the seller to the buyer on firm commitment basis." (emphasis supplied)

6.2 Mr. Dave submitted that the petitioner and GAIL are bound by the terms of the said contract and no one else other than the judicial authority can place an

interpretation on this contract, which would bind either petitioner or GAIL. According to him the true and correct interpretation of the said contract is that (i) in respect of 0.50 MMSCMD per day petitioner shall continue to pay the price at landfall point determined by the Government of India., while (ii) in respect of supply of gas in excess of 0.50 MMSCMD, the petitioner shall be ex-HBJ price of gas as per the Government pricing order. The said clause clearly visualizes one price in respect of the original firm quantity, while another price in respect of conversion from fallback allocation to firm allocation. The latter portion of the clause which reads “seller shall fix the price of gas as per directive, instruction, order, etc., of Government of India which is likely to be market related in accordance with the current policy of liberalisation of Government of India and the buyer shall pay to the seller such price of gas” does not affect the price to be charged in respect of the two quantities. It only provides that both the landfall price and ex-HBJ will be fixed by GAIL as per the directive, instruction, order of Government of India which is likely to be market related in accordance with the current policy of liberalisation and the petitioner agrees to pay such price respectively for 0.50 MMSCMD and 0.35 MMSCMD. The aforesaid clause therefore cannot be read or construed to mean that the Agreement between the petitioner and GAIL providing that petitioner shall pay ex-HBJ price in respect of the converted quantity of 0.35 MMSCMD is subject to any direction, instruction, order of the Government of India. The said clause is a general clause relating to future pricing being fixed as per the directive of Government of India whether it being landfall price or ex-HBJ price.

6.3 Mr. Dave submitted that the petitioner had agreed by the above clause of the

contract to pay ex-HBJ price that may be fixed by the GAIL as per directive of Government of India from time to time. Having agreed to such price the petitioner is not entitled to raise frivolous contention that it is not liable to pay ex-HBJ price since gas is not supplied to it through the HBJ pipeline. He submitted that the HBJ pipeline was installed at a huge cost and if any gas was supplied to any person through the HBJ pipeline, GAIL was entitled to recover transportation charges fixed on the basis of the costs incurred on laying down the pipe. Depriving such consumer GAIL agreed to supply gas to the petitioner on condition that the petitioner would be liable to pay the transportation charges payable by any HBJ customer and petitioner having agreed to such condition cannot resile from it. He submitted that while the allocation orders to Vadodara Municipal Corporation, Gujarat Narmada Valley Fertilizer Corporation, IPCL and GSFC did not mention that transportation charges are payable as detailed terms are not found in such allocation orders, all of them were supposed to and were making payment of requisite transportation charges. He submitted that it is abundantly clear from the letter dated 8.2.1996 addressed by the petitioner to GAIL that GAIL had agreed to pay the higher price chargeable to HBJ customer as was agreed by NTPC for their KAWAS project.

6.4 Mr. Dave submitted that GAIL was and is entitled to levy and collect transportation charges for the price for supply of gas along the ex-HBJ pipeline inasmuch as the agreement between GAIL and the petitioner titled as “Supplementary Agreement” and executed on 17.7.1996 amending the Contract dated 24.1.1990 with effect from 18.7.1996 inter alia, substituted article 11.01 of the Contract. The substituted Article 11.01 contains an unequivocal agreement between

GAIL and the petitioner by which the petitioner agreed to pay to GAIL as under:

> i. The present price is 1000 standard cubic meters of gas as per Government pricing order dated 31.12.1991 for 0.50 million standard cubic meters per day of gas.
>
> ii. Essar further agreed to pay for supply of gas in excess of 0.50 million standard cubic meters per day at ex-HBJ price of gas as per the Government pricing order dated 31.12.1991 and
>
> iii Essar agreed to pay GAIL price of gas fixed by GAIL as per the directive instruction Order of the Government of India after the expiry of period of the Government Pricing Order dated 31.12.1991.

6.5 He therefore submitted that GAIL was justified in charging transportation charges for the supply of gas along the ex-HBJ pipeline.

6.6 Mr. Dave has relied upon clause (iii) of the letter dated 31.12.1991 issued by Government of India stating that "Along the HBJ pipeline, the price of natural gas would correspondingly be Rs.2400/1000 cu. mts. w.e.f. 1.1.1992; and Rs.2500, Rs.2600 and Rs.2700 w.e.f. 1.1.1993, 1.1.1994 and 1.1.1995 respectively." Relying upon para 2 of the said letter he submitted that in view of the above transportation charges ex-HBJ pipeline were permitted to be levied on the prices so suggested in the said letter.

6.7 Mr. Dave submitted that on 17.7.1996 by amending the Contract dated 24.1.1990, the petitioner agreed to pay transportation charges in respect of 0.35 MMSCMD of gas. According to him, prior thereto on 8.2.1996 the petitioner in its letter to GAIL had also clearly agreed to pay such charges and therefore the Government of India, while issuing letter dated 20th May 1996 is deemed to have

taken note of such an offer of the petitioner. He submitted that Government of India did not prohibit GAIL from charging transportation charges and on the contrary it directed an amendment in the contract dated 24.1.1990 which GAIL and the petitioner did accept the same on 17.7.1996.

6.8 Mr. Dave submitted that while the petitioner purported to raise objections about levy of transportation charges from it, it entered into three agreements on 11.6.1998, 28.4.2000 and 29.6.2000 in respect of different quantities of gas but clearly agreeing to pay transportation charges in addition to the price so fixed on 18.9.1997/30.9.1997. In respect of these quantities of gas the petitioner has not raised any dispute in the present petition. Those quantities are also supplied to the petitioner at the same point where 0.35 MMSCMD of gas was supplied to it. The petitioner, therefore, cannot be heard to say that GAIL is not correct in levying transportation charge for such additional quantities.

6.9 After referring to various pleadings in the petition Mr. Dave submitted that it is clear that ex-HBJ price is nothing but transportation charges. Once this stand is admitted, the petitioner has no case to argue because the contract dated 17.7.1996 clearly provided for payment of such price as was to be fixed by GAIL after expiry of Government of India's letter of 31.12.1991. He submitted that on 18.9.1997 and 30.9.1997 Government of India has expressly provided for payment of transportation charges by consumers. He submitted that with this knowledge the petitioner without any objection in terms of clause 12.03 of the Agreement dated 17.7.1996 made payments of transportation charges over a long period and has brought about the

present petition.

6.10 Mr. Dave has submitted that there is an agreement between GAIL and Essar providing for a price including transportation charges in respect of 0.35 MMSCMD of gas under the Agreement dated 17.7.1996 is also in tune with the requirement of law. He relied upon the provisions of Sale of Goods Act, 1930. He relied upon section 5 of the Act which stipulates that “a Contract of Sale is made by an offer to buy or sell goods for a price and the acceptance of such an offer. Price is defined by section 2(10) which stipulates that “price means the money consideration for sale of goods”. Section 31 of the Act provides that “it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale. Section 32 recognizes that payment and delivery are concurrent conditions. Section 10 provides as to what agreements are contracts. He has also relied upon section 14 which defines “free consent” and section 15 which defines “Coercion.” Mr. Dave submitted that section 19 of the Contract Act clearly provides that the Contract with which consent is caused by coercion is only voidable at the option of the parties whose consent was so caused. According to him the petitioner has at no stage avoided the Agreement dated 17.7.1996.

6.11 In support of his contention Mr. Dave has relied upon two decisions in the case of Bishun Deo Vs. Seoganirai, reported in AIR 1951 SC 280 (=1951 SCR 548, 1951 SCJ 413) and in the case of Central National Bank Vs. United Industrial Bank, reported in AIR 1954 SC 181 (=1954 SCR 391). After referring to the above provisions he submitted that there is an agreement between GAIL and the petitioner

providing for a price including transportation charges in respect of 0.35 MMSCMD of gas under the Agreement dated 17.7.1996 which is in tune with the requirement of law. He submitted that in view of the facts of the case there can be no question of coercion in the circumstances.

6.12 Mr. Dave submitted that the petitioner's entire attempt is to adduce evidence in support of its interpretation of the Agreement dated 17.7.1996. The petitioner is in fact seeking a declaration from this Court based on such a premise as prayed for in prayer C of the petition. He submitted that section 91 of the Indian Evidence Act, 1872 clearly prohibits giving of such evidence in proof of terms of any Contract. He submitted that in the present case, as the terms of the Contract have been reduced in the form of a document, no evidence can be adduced to explain away its content. He further submitted that assuming but not admitting that clause 11.01 of the Agreement dated 17.7.1996 is ambiguous or defective, section 93 prohibits giving of any evidence or facts to show its meaning or supply the defect. He further submitted that section 114 of the Act clearly requires the Court to presume existence of certain facts, inter alia, having regard to human conduct and private business in relation to the facts of a particular case.

6.13 Mr. Dave submitted that Shanker Committee's recommendation on natural gas pricing has absolutely no relevance to the interpretation of contract clause 11.01, for the Shanker Committee's recommendation suggests fixing of gas price at the landfall point on the basis of the basket of law speed/high speed fuel oil. It also determines separately the transportation charges for ex-HBJ customer at Rs.850/-,

which could increase to Rs.1,150/-. According to him, Shanker Committee's recommendation, therefore, clearly fixes two prices – one being landfall price and the other by including transportation charges to the landfall price, the ex-HBJ price. These recommendations which have been implemented by the Government of India vide its order dated 18.9.1997 clearly envisages two price structure. In respect of 0.35 MMSCMD converted from fallaback basis to firm basis petitioner has agreed to pay the ex-HBJ price. He submitted that GAIL is therefor entitled to charge from the petitioner post Shanker Committee's report the landfall price plus the transportation charges in respect of 0.35 MMSCMD, while it can only charge from petitioner in respect of 0.50 MMSCMD the landfall price.

6.14 Mr. Dave submitted that the petitioner wanted to have an additional quantity of 1.40 MMSCMD, it specifically agreed by letter dated 11.6.1998 to pay ex-HBJ price an GAIL agreed to supply 1.40 MMSCMD on fallback basis at ex-HBJ price vide letter dated 11.6.1998. The Ministry's letter dated 21.12.1998 conveying approval of this allocation also clearly states that transportation charges would be borne by the petitioner. The letter by GAIL to the petitioner dated 28.4.2000 in respect of 1.40 MMSCMD on fallback basis clearly stated that transportation charges would be leviable and the endorsement thereon by the petitioner clearly accepts the said condition. He further submitted that even the subsequent conversion to the extent of 50% of fallback allotment both of the petitioner and Reliance by the Gas Linkage Committee also clearly lays down as a condition that they shall have to pay ex-HBJ transportation charges.

6.15 Mr. Dave submitted that the contention that Reliance Industries Ltd. was not being charged transportation charges based on the invoice produced at pages 588-589 is completely devoid of merits. He submitted that the charge leviable on any company depends on the contract between the parties and if the contract contemplated landfall price for firm or fallback basis, GAIL cannot charge the transportation charges. According to him, this is evident from the fact that the petitioner is not being charged any transportation charges in respect of 0.50 MMSCMD and 0.90 MMSCMD and is being charged transportation charges only in respect of 0.35 MMSCMD and the subsequent fallback allocation made in 1998.

6.16 Mr. Dave submitted that the reliance placed by the petitioner on the report of the Ministry's Committee dated 5.4.1999 and letter of the Ministry dated 28.6.1999 and 5.7.1999 is misplaced, since after appreciating the stand of GAIL the Ministry of Petroleum vide letter dated 14.8.2000 clarified that it is the GAIL's Board which should decide the issue and if the matter is not resolved the matter is settled by arbitration. The Ministry of Petroleum again reiterated the same stand and also clarified that the opinion of the Law Ministry communicated vide letter dated 14.8.2000 should not be construed as a direction to the Board of Directors. In the circumstances, it is the Board of GAIL which has to decide the price and not the Ministry. The contention that there is a direction by the Ministry therefore, if ill-founded and untenable. He submitted that GAIL is a legal entity and Government of India is not a party to contract between GAIL and the petitioner as as held by the Supreme Court in the case of A.K. Bindal Vs. Union of India, reported in (2003)5 SCC 163 (=JT 2003(4) SC 328, 2003(4) Scale 313) its identity is distinct from the

Government.

6.17 Mr. Dave submitted that there is nothing irrational in GAIL charging HBJ transportation charge, since any allocation to the petitioner would mean reducing utilization of HBJ pipeline and consequently reduce recovery of transportation charges which could have otherwise been recoverable.

6.18 Mr. Dave further submitted that Article 4.02 of Contract dated 1.1.1993 contemplates levy of service charge. The said Article reads as under:

> "4.02 In addition to the price of gas mentioned in Article 10 the buyer shall pay to the seller service charge to be worked out after completion of construction/modification of Gas Metering Station at the premises of the buyer as per formulae contained in Annexure-II which forms part of the contract. Provided further, pending completion of such facilities by the seller at the premises of the buyer, the buyer shall pay in addition to the price of gas mentioned in Article 10, service charges tot he seller,a t the rate of Rs.20/- (Rupees twenty) per Thousand Standard Cubic Meters which shall be subject to final adjustment as mentioned hereonward. The seller shall intimate to the buyer the final service charges for the Gas Metering facilities provided at the premises of the buyer within 1 month of the completion of such facilities. The buyer and the seller shall adjust the service charges paid by the buyer for a period prior to finalisation of service charges for the metering facilities provided by the seller at the Gas Metering Station at the buyer's premises within 1 month of finalization of service charges of such facilities. Provided further, if buyer and seller fail to pay/refund the amount within 1 month of finalization of service charges for the facilities the failing party shall pay in interest to the other party at the rate of 24% per annum on such amount. The service charges mentioned herein above shall be increased by 3% (Three percent) on yearly rest basis with effect from 1.4.1993 (First April One Thousand Nine Hundred and Ninety Three).

This service charge is levied only in respect of 0.90 MMSCMD of gas being supplied to the Export Oriented Unit. This was leviable pending completion of construction/modification of Gas Metering Station at the premises of the buyer. For

such construction of Gas Metering Station there would be shutdown of 15 days of the supply which was not acceptable to the petitioner and consequently the Metering Station is still not installed. He also submitted that petitioner has issued letters dated 3.1.1994 to GAIL informing that the petitioner is not agreeable to any disruption in gas supply to its plant during the currency of job of installation of control valve at their plant.

7.0 To support this contention Mr. Dave has relied upon the following decisions.

7.1 In the case of Radhakrishna Agarwal Vs. State of Bihar, AIR 1977 SC 1496 (=(1977)3 SCC 457=1977(3) SCR 249), in paragraph 21 the Supreme Court held as under:

> "21. In the cases before us, allegations on which a violation of Article 14 could be based are neither properly made nor established. Before any adjudication on the question whether Article 14 of the Constitution could possibly be said to have been violated, as between persons governed by similar contracts, they must be properly put in issue and established. Even if the appellants could e said to have raised any aspect of Article 14 of the Constitution and this Article could at all be held to operate within the contractual field whenever the State enters into such contracts, which we gravely doubt, such questions of fact do not appear to have been argued before the high Court. And, in any event, they are of such a nature that they cannot be satisfactorily decided without a detailed adduction of evidence, which is only possible in ordinary civil suits, to establish that the State, acting in its executive capacity through its officers, has discriminated between parties identically situated. On the allegations and affidavit evidence before us we cannot ready a conclusion. Moreover, as we have already indicated earlier, the correct view is that it is the contract and not the executive power, regulated by the Constitution, which governs the relations of the parties on facts apparent in the cases before us."

7.2 In the case of Premjibhai Parmar Vs. Delhi Development Authority, reported in AIR 1980 SC 738 (=1980(2) SCC 129, 1980(2) SCR 704) it is held that reciprocal

rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract would ever have a binding force. The jurisdiction of this Court under Article 32 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred.

7.3 In the case of Bareilly Development Authority Vs. Ajay Pal Singh, reported in AIR 1989 SC 1076 (=(1989)2 SCC 116, JT 1989(1) SC 368, 1989(1) SCR 743, 1989(1) Scale 439). In para 23 of the said decision it he held as under:

> "23. In view of the authoritative judicial pronouncements of this Court in the series of cases dealing with the scope of interference of a High Court while exercising its writ jurisdiction under Article 226 of the Constitution of India in cases of non-statutory concluded contracts like the one in hand, we are constrained to hold that the High Court in the present case has gone wrong in its finding that there is arbitrariness and unreasonableness on the part of the appellants herein in increasing the cost of the houses/flats and the rate of monthly instalments and giving directions in the writ petitions as prayed for."

7.4 In the case of U.P. Vs. Bridge & Roof Company (India) Ltd., reported in AIR 1996 SC 3515 (=(1996)6 SCC 22, JT 1996(7) SC 395, 1996(6) Scale 168) wherein it is held as under:

> "16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioner's

bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer. (emphasis supplied)

7.5 In the case of Kerala State Electricity Board and Anr. Vs. Kurien Kalathil, reported in AIR 2000 SC 2573 (=(2000) 6 SCC 293, JT 2000 (8) SC 167, 2005(5) Scale 202), wherein the Supreme Court held that the disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a writ petition under Article 226 of the Constitution of India and that is a matter for adjudication by a civil court or in arbitration if provided for in the contract.

7.6 In the case of National Highway Authority of India Vs. Ganga Enterprises & Anr reported in AIR 2003 SC 3823 (=(2003) 7 SCC 410, JT 2003 Supp-I SC 85, 2003(7) Scale 170) wherein it is held that the dispute in that case was regarding the terms of offer and they were thus contractual disputes in respect of which a writ court was not the proper forum.

7.7 Mr. Dave has submitted that it is now well settled that the writ petition is not an appropriate remedy for impeaching contractual obligations. In this connection he has relied upon a decision of the Supreme Court in the case of Harshanker Vs. Deputy ENT Commissioner, reported in AIR 1975 SC 1121 (1975(3) SCR 254, 1975(1) SCC 737), wherein it is held that the writ jurisdiction of the High Court under Article 226 of the Constitution of India is not entitled to facilitate avoidance of obligation voluntarily incurred. While relying upon the decision in the case of Banchhanidhi Rath Vs. The State of Orissa & Ors, reported in AIR 1972 SC 843

(1972(4) SCC 781 and LIC Vs. Escorts, reported in AIR 1986 SC 1370 (=1986(1) SCC 264, 1985(2) Scale 1289). Mr. Dave submitted that no mandamus can be issued against a government or a government company to enforce any claim in terms of contract and that Article 14 cannot be extended to control contractual transaction of a corporation or a State instrumentality. He submitted that the present petition seeks to avoid contractual obligation under diverse agreements executed between the petitioner and the respondent no.3 including those contained in Supplementary Agreements dated 17.7.1996. The aforesaid agreements were duly executed, acted upon and have either lived their life or are subsisting, as the case may be. The said contracts have not been avoided by the petitioner at any stage. He, therefore, submitted that the present writ petition seeking diverse reliefs including the terms of prayer [c] for avoidance of contractual obligation is clearly not maintainable.

7.8 Mr. Dave submitted that the present petition filed in May 2001 seeks to dispute certain contractual obligations of the petitioner particularly in relation to payment of price for natural gas supplied to the petitioner from 17.7.1996 under the Supplementary Agreement of 17.7.1996. He therefore submitted that there is gross delay in filing the petition and the petition is required to be rejected on the ground of delay, latches and acquiescence. He submitted that the writ petitions under Article 226 of the Constitution of India must be filed as expeditiously as possible and that belated writ petitions are liable to be dismissed without giving any relief. In this regard he has relied upon the following decisions of the Supreme Court:

(i) Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati & Ors., reported in AIR 1969 SC 329 (=1969(1) SCR 808).

(ii) M/s Tilokchand Motichand & Ors. Vs. H.B. Munshi, Commissioner of Sales Tax, Bombay & Anr., reported in AIR 1970 SC 898 (=1969(1) SCC 110, 1969 (2) SCR 824).

(iii) P.S. Sadasivaswamy Vs. State of Tamil Nadu, reported in AIR 1974 SC 2271 (=1975(1) SCC 152, 1975(2) SCR 356)..

(iv) State of Maharashtra Vs. Digambar, reported in AIR 1995 SC 1991, (= (1995) 4 SCC 683, JT 1995(9) SC 310, 1995(4) Scale 98).

(v) S.K. Kushwaha Vs.D.K. Joshi & Ors, reported in AIR 2002 SC 1455 (= (2002) 4 SCC 172 (para 14), JT 2002(3) SC 229, 2002(3) Scale 1.

(vi) Urban Improvement Trust, Udaipur Vs. Bheru Lal & ors., reported in AIR 2002 SC 309 (=(2002) 7 SCC 712 (para 21), JT 2002(7) SC 310, 2002(6) Scale 558.

(vii) Chairman and M.D., B.P.L. Ltd. Vs. S.P. Gururaja and Ors, reported in AIR 2003 SC 4536, (= 2003(8) SCC 567 (para 32), JT 2003 (Supp.2) SC 515, 2003(8) Scale 536.

(viii) The Printers (Mysore) Ltd., Vs. M.A. Rasheed and Ors., reported in 2004(4) SCC 460 (=JT 2004(4) SC 158, 2004(4) Scale 192).

(ix) R & M Trust Vs. Koramangala Residents Vigilance Group and Ors., reported in AIR 2005 SC 894 (=2005(3) SCC 91).

7.9 Mr. Dave has next contended that a writ should not be issued on the ground of coercion. He submitted that the petitioner has purportedly founded its petition on the allegation that it compelled to agree to the condition for payment of price at ex-HBJ price in respect of gas supply under diverse agreements. He submitted that the petitioner did not give any particulars it is well settled that the party asserting coercion to avoid a contract must set out all facts constituting its validity. In this connection Mr. Dave has relied upon the decisions in the case of Balgangadhar Tilak Vs. Shrinivas Pandit, reported in PC(7) 1915, in the case of Bhishundeo Vs. Seogani Rai, reported in AIR 1951 SC 280 (=1951 SCR 548, 1951 SCJ 413) and in the case of Vijaysinh M. Solanki Vs. Transport Manager, AMTS, reported in AIR

1982 (Gujarat) 307. He submitted that the petitioner is not able to establish coercion in respect of diverse contracts including Supplementary Agreement dated 17.7.1996 the remedy available to it is to avoid the contract. He further submitted that such a contract is not void, but is only voidable. In this regard he has relied upon decisions in the case of Linch Vs. DPB, Northern Island, reported in 1975 AC 653, North ocean Shipping Co. Ltd. Vs. Hundai Construction Co. Ltd., reported in 1978(3) All ER 1170, Hallsbury Lalws of England, 4th Edition, Vol.9, and Central National Bank Ltd. Vs. United Natuiral Bank Ltd., reported in AIR 1954 SC 181 (=1954 SCR 391, 1954 SCJ 54).

7.10 Mr. Dave has submitted that the petitioner has prayed for refund of amounts paid by including towards transportation charges for the period between 17.9.1996 to April 2001. He stated that the petitioner has paid the said amounts pursuant to its contractual obligation, which contracts have not been avoided by the petitioner at any stage. The aforesaid contracts were legal and binding between the parties. That being the position, the claim for refund is entirely baseless, there can be no claim in respect of the price agreed to be paid and which became payable by the petitioner in respect of supplies effected by respondent no.3 and received by the petitioner over a long period of time. He submitted that the provisions of Sale of Goods Act clearly militate against such a claim. He has relied upon a decision in the case of Dhanyalakshmi Rice Mills Vs. Commissioner of Civil Supplies and Anr, reported in AIR 1976 SC 2243 (=1976(40 SCC 723, 1976(3) SCR 387) wherein it is held that writ petition claiming refund in respect of amounts payable under a contract is not maintainable.

7.11 Mr. Dave submitted that the petitioner has challenged the demand raised by the respondent no.3 on 1.5.2001 whereunder respondent called upon the petitioner to pay the outstanding amount of Rs.124.5587 crores due and payable under diverse contracts failing which the petitioner was informed that its gas supplies would be disconnected with effect from 9.5.2001. He submitted that undisputedly the aforesaid amount is due and payable by the petitioner under diverse contracts including the Supplementary Agreement dated 17.7.1996. The said amount represents the price payable by the petitioner on Ex-HBJ basis including towards transportation charges/service charges in respect of both firm and fallback allocation. According to him, the petitioner having unequivocally agreed under diverse contracts cannot escape its liability by filing the present petition. He therefore submitted that the demand dated 1.5.2001 is legal and valid and is not liable to be interfered with.

7.12 In view of the above submissions Mr. Dave submitted that the petition requires to be rejected with costs.

8.0 Mr. Thakar, learned Advocate appearing or ONGC submitted that the petitioner has not claimed any relief against ONGC and further submitted that ONGC adopts the arguments advanced on behalf of GAIL.

9.0 Mr. Jitendra Malkan, Assistant Solicitor General of India, appearing for Union of India, Ministry of Petroleum and Natural Gas submitted that the price at the landfall point and also the transportation charges through HBJ pipeline have been

fixed by issuing necessary directions. He submitted that in the present case relevant notification is notification dated 18.9.1997 and 30.9.1997 whereby prices of natural gas were revised from1.10.1997 linking the consumer price of the gas landfall price to price of basket of LS/SH fuel Oil for the period from 1.10.1997 to 31.3.2000. He further submitted that allocation of gas is done by the Company on the recommendations of Gas Linkage Committee which is binding on the companies and the companies have to supply gas accordingly. GAIL and two other companies represent on the Gas Linkage Committee. Mr. Malkan further submitted that a committee was constituted in the Ministry of Petroleum and Natural Gas for examination of the representation of the petitioner Company with regard to transportation charges for supply of gas by GAIL after giving an opportunity of being heard to the respective parties and after considering the report of the committee the respondent no.1 asked GAIL to follow the gas pricing orders. Mr. Malkan submitted that it was clarified in the letter dated 14.8.2000 that the transportation charges for HBJ pipeline were not applicable in the present case.

9.1 It is required to be noted that the petitioner has set up the steel complex in the year 1989-90 solely for the reason that natural gas available in abundance in Hazira and most of the gas had remained unutilized on account of lack of the requisite demand. The petitioner company has set up the steel complex at an infrastrustrural costs of Rs.6000 crores and it appears that there was an assurance from the ONGC/Government of India that the price for supply of gas would be such price as may be fixed by the Government of India from time to time. It is also required to be noted that it is on the aforesaid assurance that the petitioner has

invested such huge amount and approximately 10000 people depend on the petitioner company for their livelihood on account of direct/indirect employment as well as in the ancillary activities.

10.0 Gas Authority of India Limited i.e. GAIL was established as a wholly owned Company of the Government of India in 1984 with 100% equity held by the Government of India. GAIL builds and operates pipelines, across the country, for transmission of gas from the production/landfall point to the point of consumption. GAIL has commissioned the Hazira-Bijapur-Jagdishpur pipeline (HBJ pipeline) which linked Western India to central and northern India.

10.1 The Government of India has established GAIL as a wholly owned Company of Government of India in 1984 with 100% share for performing functions of transportation and marketing of natural gas vesting in the Government of India. Government has retained the control and power to determine price and allocation of gas with it. Being a fully Government of India owned company, GAIL is a “State” within the meaning of Article 12 of the Constitution of India. This fact is not disputed by the respondents.

11.0 The respondent has raised a preliminary contention that the petition raises disputed question of fact and writ is not an appropriate remedy to decide the disputed question of facts. In this connection it is required to be noted that the petitioner herein is not challenging the contract dated 17.7.1996 or terms thereof, but is challenging the action of GAIL on the ground that the same is dehors or contrary to the condition

or contract or in breach of the obligation of GAIL under the contract. On the facts of the case it is clear that the petitioner has challenged the action of non-compliance or violation of the orders and directions issued by the Government of India in the form of Pricing Orders as well as specific directions in light of the report of the Specially constituted Committee. In this regard it is useful to refer to certain decisions which directly cover the issue in question.

11.1 In the case of Gujarat State Financial Corporation Vs. M/s Lotus Hotels Pvt. Ltd., reported in AIR 1983 SC 848 (=1983(3) SCC 379), the Supreme Court, in para 12, held as under:

> "12. Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation,the Court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Article 12."

11.2 In the case of Kumari Shrilekha Vidyarthi Vs. State of U.P. and others reported in AIR 1991 SC 537 (=1991(1) SCC 712, JT 1991 SC 211, 1990 Supp(1) SCR 625, 1990(2) Scale 561), it is held as under:

> "The Constitution does not envisage or permit unfairness or unreasonableness in State action in any sphere of its activity contrary to professed ideals in the preamble. Exclusion of Article 14 in contractual matters is not permissible in the constitutional scheme. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and

> permit judicial review, it can be said that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for the purpose is present also in contractual matters. Therefore, it would be difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity of the anvil of Article 14."

11.3 In the case of Narmada Cement Co. Vs. State of Gujarat and Another, reported in 1997(2) GLR 1386 (=1997(1) GLH 168, 1997(1) GCD 807) wherein it is held that the position of law laid down by the Supreme Court is that even in respect of contractual obligations of the parties, the State is not relieved of its obligations of complying with the provisions of Article 14 of the Constitution i.e. to act justly, fairly and reasonably. Applying to the facts of the present case, if it is found that the impugned act of the respondents is beyond the treatment of Clause 26 of the agreement of 1990-91, the petition is maintainable, otherwise not. The case of Kum. Shrilekha Vidyathi (supra) is followed.

11.4 In the case of ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India Limited & Ors, reported in 2004(3) SCC 553 (=JT 2003(1) SC 300, 2003(10 Scale 815, 118 Company Cases 273). Para 19 of the said decision reads as under:

> "19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of St. Gunvant Kaur (Supra), this Court even went to the extent of holding that in a writ petition, if facts required, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises

out of a contractual obligation and or involves some disputed questions of fact."

A perusal of the aforesaid judgement in the case of ABL International Limited it is clear that (a) petition under Article 226 against an instrumentality of State in respect of an action arising out of contractual obligation is maintainable, (b) merely because some disputed questions of facts arise, same cannot be a ground to refuse to entertain writ petition. Such dispute can be gone into where it does not require any external aid or any oral evidence to interpret the contract, [c] a writ petition involving consequential relief of monetary claim is maintainable and [d] jurisdiction would be exercised, despite other remedy being available where the action is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid or legitimate reasons. On the facts of the case it is not disputed that GAIL is an instrumentality of State within the meaning of Article 12 and therefore I am of the view that the petition against GAIL would be maintainable even if the dispute has arisen out of a contract. Further, in the instant case, no oral evidence is required to interpret the contract.

11.5 The aforesaid decision considered the decisions in the case of State of U.P. Vs. Bridge & Room Company (India) Ltd., reported in AIR 1996 SC 3515 (= (1996)6 SCC 22, JT 1996(7) SC 395, 1996(6) Scale 168 and in the case of Kerala State Electricity Board Vs. Kurien E. Kalathil, reported in AIR 2000 SC 2573 (=2000(8) SCC 293, JT 2000(8) SC 167, 2000(5) Scale 252) which are relied upon by the respondents.

11.6 Respondents have relied on a decision in the case of Heavy Engineering Corporation Limited, reported in AIR 1970 SC 82 (=1969(1) SCC 765, 1969(3) SCR 905) and contended that only by reason of the fact that GAIL is the Government Company and the Government, under the Memorandum and Articles of Association, exercises administrative power and holds substantial capital, does not become an agent of the Government. The observations made in the said decision are in the context of the case as to whether heavy Engineering Corporation Limited can be said to be carried on " under authority of " Central Government for purpose of 2(a) Industrial Disputes Act. The Court was not examining the question whether Heavy Engineering Corporation Limited was an agency or instrumentality of the State within the meaning of Article 12. The factors which found to be present in the case of Heavy Engineering Corporation Limited are relevant for the purpose of deciding whether such Government company is an agent or instrumentality of the State, but this was not the issue in the said matter. On the facts found in Heavy Engineering Case, such Corporations are held to be agency or instrumentality of State. The decision in the case of Heavy Engineering Corporation Limited has been discussed and explained in the case of Steel Authority of India Ltd. Vs. National Union Waterfront Workers and others, reported in AIR 2001 SC 3527, 2001(7) SCC page 1, JT 2001(7) SC 268, 2001(Supp.2) SCR 343, 2001(5) Scale 626). It is an undisputed fact that GAIL is an agency or an instrumentality created by the Government of India for performing the functions of transporting and marketing natural gas on its behalf. The actions of GAIL related to the performance of the aforesaid functions are, therefore, subject to judicial review even if they arise out of contractual rights and obligations on the ground that if such action is arbitrary, unreasonable, unfair and/or in violation of Article 14.

12.0 The real controversy between the parties is whether, on proper interpretation of the supplementary agreement dated 17.7.1996, GAIL has right to demand HBJ transportation charges in respect of supplies in excess of 0.50 which would cover the fallback quantity of 0.35 converted into firm basis and additional or fallback supplies made after the date of the agreement at ex-HBJ price.

12.1 Before proceeding further, few facts are required to be pointed out. In view of the decision of the Central Government to divert the activities of the respondent no.2, and ONGC to concentrate only on production of natural gas, respondent no.1 formed "Gas Linkage Committee" (hereinafter referred to as GLC), which is an inter ministerial committee to decide allocation of gas. Prior to 1986 the respondent no.2 was deciding the price of natural gas and there were serious discrepancies in price and there was discriminatory treatment to the consumers.

12.2 In that view of the matter the respondent no.1 decided to have a fixed price of natural gas and such decision was taken by constituting a committee which was known as "Shankar Committee". By a circular dated 30.1.1987, the price of gas was fixed by the Ministry of Petroleum and Natural Gas, which price was exclusive of royalty, taxes, duties and other statutory levies and the said price was made effective immediately. The price at which the gas is to be supplied is fixed by the Government of India and intimated to various gas supplying agencies viz. (i) GAIL, (ii) ONGC and (iii) OIL by means of Price Orders issued from time to time. Till date Price Orders have been issued by the Government of India on (i) 30.01.1987 (ii) 31.12.1991 (iii)

18.09.1997 and (iv) 30.09.1997.

12.3 The petitioner company has laid its own gas transportation pipeline from ONGC landfall point to its own plant at Hazira, Surat at its own costs which is also operated and maintained by the petitioner company. Therefore no transportation charges were ever demanded by ONGC. In the case of petitioner company, the total gas is admittedly delivered and title to the gas is transferred to the petitioner at the "landfall" point i.e. the Metering Station of ONGC, Hazira. Beyond that point the petitioner has been transporting gas so delivered to it to its factory through the petitioner's own pipeline, entirely at petitioner's risk and costs, of a distance of 18 Kms, and which pipeline is owned, operated and maintained by the petitioner company as per the conditions stipulated in the contract dated 24.1.1990. Ordinarily this would apply to all subsequent contracts inasmuch as once having invested such a huge amount it would not be appropriate to change the mode of transportation. It is required to be noted that neither ONGC nor GAIL has laid any pipeline from the landfall point to the petitioner's plant. Therefore it is the say of the petitioner that no transportation charges can be levied by the respondent no.3 on the petitioner company. Admittedly the allocation is done by Central Government and even the price is fixed by the Central Government.

12.4 As per the allocation made by Government of India from time to time, the petitioner company entered into various agreements/contracts with respondent no.2 i.e. ONGC. As per the instructions of Government of India, the marketing functions of ONGC were transferred to GAIL w.e.f 16.5.1992. After the transfer of the functions

from ONGC to GAIL, GAIL asked the petitioner company to sign a fresh contract with it in respect of 0.90 MMSCMD on the same terms and conditions of ONGC. However, in the contract so entered, GAIL imposed a condition of levy of metering charges, though such levy is not permitted under various Pricing Orders of Government of India and also not charged by ONGC to other consumers.

12.5 In the year 1996, at the time of conversion of 0.35 from fallback to firm quantity, GAIL advised the petitioner that NTPC, Kawas, although Ex-Hazira consumer, has agreed to pay ex-HBJ rate instead of applicable rate of ex-Hazira. Under the circumstances the petitioner informed that in case the petitioner company wants to enter into an agreement for such firm supplies, the petitioner should agree for ex-HBJ price. The petitioner company therefore agreed for payment of Ex-HBJ rate for this 0.35 quantity although it was not applicable as per 1991 Price Order pending finalisation and implementation of Shanker Committee's recommendation i.e. till the release of new Pricing Order i.e. upto 30.9.1997. It is required to be noted that the petitioner later on found that the say of GAIL that NTPC being an Ex-Hazira consumer was false. It was only on this misrepresentation that the petitioner company agreed to pay Ex-HBJ charges. It is also required to be noted that the GLC and allocation letter did not mention anything about payment of Ex-HBJ price.

12.6 The contract dated 20.8.1991 provided that the price of gas shall be as per decision of Government of India from time to time. The Price Order was issued for the first time by the Government of India fixing and regulating the price for supply of gas to various consumers. Such decision was taken only because of the fact that

there were rampant discrimination in fixing the oil price. The Government of India issued 2nd Pricing Order on 31.12.1992 to ONGC, OIL and GAIL. The said Price Order Continued the concept of two classes of consumers of gas i.e. (i) at landfall point and (ii) along the HBJ pipeline and fixed different prices for both. Under this contract GAIL has been recovering metering charges at Rs.20/- per 1000 SCM only in respect of quantity supplied under this contract. There is nothing on record to show that GAIL can recover such charges from the petitioner. It is also required to be noted that no such metering charges are recovered from any other consumers or even in case of petitioner in respect of other quantities.

12.7 From the record it is evident that on 20.5.1996 Government of India ordered to convert the fallback quantity of 0.35 MMSCMD in firm basis and no condition whatsoever for payment of HBJ pipeline price was imposed by the Government of India in respect of the said quantum of gas converted from fallback to firm basis. A supplementary agreement was signed between GAIL and the petitioner for converting 0.35 MMSCMD of gas being supplied on fallback basis into firm basis on condition that such supply shall be at the “HBJ price” till such time the new price order was issued by the Government of India. This condition was imposed despite the fact that no condition for payment of Ex-HBJ price was made by the Gas Linkage Committee or by the Government of India in its order dated 20.5.1996.

12.8 Government of India issued 3rd Pricing Order dated 18.9.1997 revising the price by prescribing uniform price for all the consumers and provided as under:

> "Basic consumer price of the gas would be determined and notified by GAIL with the approval of the Ministry. The same would vary between the floor price of Rs.2150/- per 1000 SCM and the ceiling price of Rs.2850/- per 1000 SCM in case of landfall point consumers. For the consumers along HBJ pipeline, in addition to the above basic price, transportation charges payable to GAIL under clause (iv) would be Rs.1150/- per 1000 SCM. For other consumers the transportation charges were on transportation done by GAIL i.e. on actuals."

12.9 In pursuance of this GAIL wrote a letter dated 4.10.1997 to the petitioner stating that the price of natural gas was determined at Rs.2150/- per 1000 SCM and HBJ transportation charges of Rs.1150/- per 1000 SCM although transportation charges were not part of the price at all and not payable by the petitioner. The issue regarding levy of transportation charges arose from this point. In fact the petitioner has therefore written letters dated 4.12.1997, 26.3.1998 and 25.5.1998 objecting to such levy of charges. From the record it appears that in the invoice of Reliance Industries Limited, no transportation charges were levied by GAIL during the same period. The petitioner wanted adhoc/fallback supplies to be continued further and therefore petitioner accepted that for supplies of additional quantity of 1.40 MMSCMD (over and above 1.75 MMSCMD), it would pay HBJ transportation till the regularisation of the same by Ministry of Petroleum and Natural Gas and it would abide by terms of such allocation by Government. In response to this GAIL has written to the petitioner that additional supply of gas over and above the existing contracted quality/allocation of 1.75 MMSCMD would be at a price applicable to consumers along the HBJ pipeline.

12.10 The petitioner alleged that any additional supply by GAIL against this arrangement was possible only on adhoc/fallback basis to avoid flaring as brought

out by GAIL and not at the cost of HBJ consumers. The argument of GAIL is that the petitioner cannot be given supply without HBJ charges when other consumers are ready to pay such charges. I am of the opinion that being a government company, GAIL should not have adopted such attitude when the petitioner has made huge investment for pipeline and plant and machinery. Being a monopoly player in the market, when the petitioner has made their own arrangements for transportation of oil, merely because others are ready to make such payment, it was arbitrary on the part of the GAIL to demand such transportation charges.

13.0 Even looking to the industrial policy of the Government of India, GAIL should not have adopted such a step of charging transportation charges, when in fact GAIL is not incurring anything for transportation of gas to the petitioner company. For any government company, profit should not be the only motive, but it should see the overall development of the economy. Therefore the aforesaid argument on the part of GAIL is not befitting to a governmental organisation especially when the petitioner has invested for erection and maintenance of pipeline. It is not shown on record that GAIL has not recovered the interest on the investments of HBJ pipeline. On the contrary it is claimed that it is one of the best profit making companies of Central Government. The production by the petitioner will not save foreign exchange, but will certainly contribute to the growth and progress of the nation in various ways.

14.0 In pursuance of various representations made by the petitioner the Government of India constituted a Committee to examine and submit its recommendations on the issue of charging transportation charges by GAIL on the

petitioner. The Committee heard both the parties and submitted its report on 4.5.1999 recommending that in view of the facts of the case, transportation charges could not be levied by GAIL for supply of natural gas to the petitioner. Based on the said recommendations of the Committee, Government had issued an order to GAIL stating that GAIL should follow GAS Pricing Orders dated 18.9.1997 and 30.9.1997 and accordingly fix the transportation charges. In view of the communication of GAIL on 28.6.1999 with regard to amount of refund, Government directed GAIL to refund to the petitioner the excess transportation charges claimed on the gas supplies. It also mentioned that Pricing Order dated 18.9.1997 has clearly notified the consumer price at landfall point and hence HBJ transportation charges are not applicable on supplies to the petitioner. Again on 5.7.1999 Government directed GAIL to refund to the petitioner the amount of transportation charges collected from the petitioner.

14.1 The Government constituted a Committee to examine and submit its recommendations on the issue of charging transportation charges by GAIL on the petitioner. The relevant part of the said Committee report reads as under:

> "5. After considering representations and view of both the parties the Committee observes that as per the earlier pricing order of the Govt. two different rates were fixed one for the gas supplies along HBJ and the other for gas supplies at the landfall point. The price for gas supplies ex-HBJ included the gas price at landfall point plus transportation charges along HBJ pipeline. The steel plant of M/s Essar is at Hazira which is the landfall point. Therefore, GAIL ought to have charged the gas price at landfall point from Essar for the gas supplied at Hazira. However, M/s Essar and GAIL entered into a contract agreeing to pay the HBJ price for gas supply beyond 0.5 MMSCMD. This contract clearly provides that the price would change as per the pricing orders issued by the Govt. from time to time. M/s Essar also wrote a letter to GAIL indicating that they are signing this agreement with the condition that the price be reviewed once Govt. issues the pricing orders based on the recommendations of the Shankar Committee. It implies that an

agreement was reached between the two on the price payable till the Government issues fresh pricing orders as indicated above. Committee is, therefore, of the opinion that there is no case for reviewing the payments made by M/s Essar till 18.9.97 (when revised pricing order was issued) as the same was based on agreement between the parties.

6. The Govt. vide its orders bearing No.L-12015/3/94-GP dated 18.9.97 has clearly notified the consumer price at landfall point and has specified that the transportation charges would be payable in addition to this price. The transportation charges along HBJ has been fixed at Rs.1150/MCM while transportation charges for other pipelines is as applicable. As M/s Essar's plant is located at Hazira which is the landfall point, transportation charges as such are not applicable. The above pricing order is effective form 1.10.97.

7. Keeping the above facts in view, the Committee is of the opinion that GAIL should not have charged the HBJ price/HBJ transportation charges from M/s Essar Steel Ltd. for the period 1.10.97 onwards as it is neither in accordance with pricing order nor is there an agreement between the parties to the contrary. The Committee therefore, recommends that the representation of M/s Essar Steel Ltd. be forwarded to GAIL and GAIL may be asked to take action as per the gas pricing orders dated 18.9.97 and consequently refund any extra charges collected by GAIL from Essar Steel Ltd. w.e.f. from 1.10.97.""

14.2 Thus, the Committee was of the opinion that GAIL was not entitled to charge transportation charges from the petitioner. Based on the above recommendations of the Committee Govt. issued an order on 21.5.1999 directing GAIL to follow gas pricing orders dated 18.9.1997 and 30.9.1997. In spite of this GAIL wrote a letter on 3.6.1999 for a clear directive from Government regarding refund. Therefore Government by communication dated 28.6.1999 directed GAIL to refund to the petitioner the excess transportation charges claimed on gas supplies. It appears that GAIL has also prepared a minutes of the meeting regarding the decision of the Board to refund/adjust the amount towards future supplies to the petitioner and also to ask the petitioner to give an undertaking not to claim interest. Therefore, it is clear that GAIL had in fact accepted the order of the Government and decided to implement the same. In spite of this fact, without implementing the same, after a

period of two months, GAIL wrote letter dated 23.9.1999 requesting the Ministry to review the said decision.

14.3 Despite there being fall back allocation dated 21.12.1998 for 1.40 MMSCMD on fallback basis, GAIL wrote a letter dated 28.4.2000 to the petitioner to accept levy of HBJ transportation charges on supply of 1.40 MMSCMD on fallback basis meaning thereby the petitioner has to accept levy of transportation charges. The petitioner accept the same without prejudice. It is required to be noted that there cannot be fallback supply at the cost of HBJ consumer so as to charge transportation charges.

14.4 The above facts would clearly show that from the very beginning the petitioner objected to levy of transportation charges and therefore I do not find any merits in the submission regarding delay and latches. The notice is dated 1.5.2000 and th petition has been filed immediately. Other prayers being pursued before the Central Government where both parties have appeared.

15.0 From the record it is clear that till 1986 the supplies of gas were made by the ONGC at negotiated prices at which point of time the Government of India decided to fix the prices for supply of gas so as to bring uniformity in the said pricing structure. It is under the said circumstances Price Order was introduced for the first time by the Government of India. being Price Order dated 30.1.1987. This action of the Government was recognized by the Supreme court in the decision in the case of O &N G Commission Vs. Association of N.G.C. Industries of Gujarat and others,

reported in AIR 1990 SC 1851 (1990 Supp SCC 397, JT 1990(2) SC 516) wherein it is held that the jurisdiction for fixation of prices came to be vested with the Government of India in 1987. The aforesaid Pricing Order makes clear the intention of the Government of India to introduce government control in the matter of pricing for supply of natural gas and consequential elimination of mutually negotiated price between the buyer and the seller. Now when the respondents alter the prices, it would defeat the purpose of the Government of India to bring uniformity in the pricing structure. From the facts stated above, it is clear that GAIL has sought to ignore the said Pricing Orders and sought to charge the price for supply of gas beyond the said prices fixed by the Government of India.

15.1 From the record I find that despite the Government control in matters of prices, the invoices were raised by GAIL continuing to charge ex-HBJ price when the concept of ex-HBJ price was abolished vide Pricing Order dated 18.9.1997 based upon the Shankar Committee's Report. GAIL showed NIL transportation charge in its invoices and loaded the ex-HBJ price in the price for supply of gas and indirectly charged the transportation charges.

15.2 The contention raised by the petitioner that the pricing order issued from time to time by the Government of India are binding on the Government Oil Companies are not denied by the Union of India. Therefore the same is deemed to be admitted. In that view of the matter the denial by GAIL with regard to the binding nature of the Price Orders, is of no consequence. Moreover, GAIL has not pointed out anything to show that they have the authority to charge any extra amount than what is

prescribed by the Government of India. In any case it is for the author of the Pricing Orders viz. the Government of India to clarify the binding nature of the said pricing orders and not for GAIL who is merely a marketing agent of the Union of India. With regard to the proposition that when there is no denial or counter allegations by the Central Government, the statements of the petitioners have to be accepted as true, learned counsel for the petitioner has relied upon two decisions in the case of Naseem Bano Vs. State of U.P. and others, reported in AIR 1993 SC 2592 (=1993 Supp (4) SCC 46 JT 1993(4) SC 553, 1993(3) Scale 431) and in the case Nanalal Amardas Vs. State, reported in 1978 GLR 863.

15.3 The Government of India, on the basis of the report of the Shankar Committee declared its new price policy superseding the earlier Pricing Order. On account of such supersession, the 1991 Price Order, which had envisaged two types of prices viz. one for the landfall consumer and one for the HBJ consumer was abolished. Instead of the said system of dual pricing, the Government of India introduced the concept of uniform price known as the basic price at landfall point and instead introduced the concept of transportation charge for two classes of consumers.

15.4 So far as the HBJ consumer is concerned, clause (iv) provide for the formula for computation of transportation charge payable by consumer along the HBJ pipeline. So far as the Non-HBJ is concerned, clause (vii) provided for the payment of transportation charge in addition to the price above. Thus the concept of ex-HBJ price was clearly abolished and instead the concept of “charge” for various classes of

consumers was introduced. As is well settled, a “charge” is a levy for the service rendered and hence the same cannot be mixed or confused with a “price”. GAIL, however, has continued the life of the said agreement dated 17.7.1996 even beyond the Pricing Order dated 18.9.1997 despite the fact that the said contract was only till the declaration of the new price policy. Therefore, when the new Pricing Order abolished the concept of “ex-HBJ price”, it is not permissible or open for the GAIL to continue the said levy of ex-HBJ price by including the transportation charge under the heading of “ex-HBJ price”.

15.5 GAIL has not charged transportation charge in the invoice raised on the petitioner after the said Pricing Order dated 18.9.1997, but included the same in the basic price since it could not have charged the HBJ transportation charge from the petitioner under the Pricing Order dated 18.9.1997 contrary to the intention of the Government of India. This action of GAIL would show that GAIL can charge any amount from any consumer irrespective of the Pricing Order of the Government of India. Such a contention on the part of GAIL cannot be accepted especially when the Pricing Order was introduced only with a view to discard the discriminatory treatment meted out to various consumers.

15.6 It is required to be noted that the invoice raised on 3.11.1997 on Essar the basic price included transportation charge and relevant column of transportation charge is shown as “Nil”. In voice dated 16.4.1998 raised on Reliance Industries wherein the basic price was charged as per pricing order of 1997 and no transportation charge is shown as “Nil” as no transportation charge was liable.

Further, the invoice dated 1.5.98 raised on Essar shows the basic price as Rs.3421/- which included transportation charge and relevant column of transportation charge is shown as “Nil” despite no transportation charge was leviable. Again in Invoice dated 16.11.1998, the basic price was shown as Rs.3372/- and in the column of transportation charge it is mentioned as “Nil”. The same manner is followed in the invoice dated 1.2.1999. In the Invoice dated 16.4.1999 the price shown was Rs.3167 and the relevant column of transportation charge shows Rs.1150/- as transportation charge.

15.7 In any case the ex-HBJ price referred in the earlier Price Order is not referred to in the last circulars. It may be noted that the allocation of gas is to be fixed by the Central Government and the price is also to be fixed by the Central Government. Thus, the role of respondent no.3 GAIL is only for the purpose of executing the quota of natural gas as fixed by the Central Government and to collect the costs and other service charges. I am of the view that the GAIL cannot change the price structure fixed by the Central Government.

16.0 I am of the view that the respondent no.3, being an agency of Central Government has also to keep in mind the aspect of national growth by way of expansion of industries. No doubt, profit is one of the considerations, but one has to strike balance between national growth and profit. Moreover, the petitioner Company has made a huge investment prior to the policy of globalisation by the Central Government when the Central Government was in need of foreign exchange to meet with the deficit of foreign exchange. Therefore, the respondent no.3 should not have

acted like a private company by charging transportation charges when the petitioner is transporting gas in its own pipeline.

16.1 The agreement which has been sought to be relied upon by the respondent is between two unequals. On the facts of the case it is seen that the respondent no.3 being a monopolistic agency of the State, the petitioner had no other option but to agree to the conditions of respondent no.3. However, it is required to be noted that the petitioner has from the beginning itself started objecting to such levy. Thus, it may be the ingredients of coercion as held by the Apex Court at not exactly matched, but the conditions were agreed upon between two unequals and respondent no.3 being a monopolist State Agency should not have taken undue advantage of the position of the petitioner, i.e. Point of no return after huge investments.

16.2 In fact in the present proceedings the Union of India has reiterated its stand that the respondent no.1 had asked GAIL to follow the gas pricing orders and it was clarified by letter dated 14.8.2000 that the transportation charges for HBJ pipeline were not applicable in the present case. It was also stated that earlier decision that the transportation charges are not recoverable is not changed by the Union of India.

16.3 In the case of Reliance Industries, which is similarly situated and an ex-Hazira consumer, GAIL has not charged HBJ pipeline price during July 1996 to May 1998 for ad hoc supplies. In the case of Reliance the Government of India imposed the said condition for the first time only on 5.6.2000 on which date similar condition was

imposed by Government of India even in the case of petitioner. Therefore this Court is required to accept the discriminatory treatment meted out to the petitioner.

17.0 It is required to be note the clause 11 of the Contract which reads as under:

> "11.01 The price of one thousand (1000) STANDARD CUBIC METERS of GAS delivered at the Gas Metering Station shall be as per ANNEXURE-II. The price of Gas will change as and when Government changes the price.
>
> 11.02 The price of GAS in clause 11.01 above is exclusive of pipeline cost reimbursement, Royalty, sales Tax, Duties, Rate, Cess Fee and all other statutory levies as applicable at present or to be levied in future by the Central or State Government or Municipality or any other body or bodies which shall be borne by the BUYER over and above the aforesaid price.".

17.1 Clauses (i), (ii), (vi) and (xii) of the Pricing Order dated 18th September 1997 read as under:

> [i] From October 1, 1997 to March 3, 2000, the consumer price of gas at landfall points would be linked to the price of a basket of LS/HS Fuel Oils as shown in the table below:
>
> %age of LS/HS FO Price
>
> | Year | General Price | Concessional Price for the North-East States |
> |---|---|---|
> | 1997-98 | 55% | 30% |
> | 1998-99 | 65% | 40% |
> | 1999-2000 | 75% | 45% |
>
> [ii] The price would be determined and notified by GAIL with the approval of the Ministry for every quarter depending upon the average price of the basket of Fuel Oils based on the figures contained from platt's Oilgram for the previous quarters. The general price would vary between the floor price of Rs.2150/MCM and the ceiling price of Rs.2850/MCM and the concessional price for the North-Eastern States would have a floor price of Rs.1200/MCM and the ceiling price of Rs.1700/MCM. A discount of Rs.300/MCM would also be available for consumers in the North-East on a case to case basis and the

concessional price and the discount of Rs. 300/MCM would be available on a case to case basis to the new units in the North-Eastern States set up during 1997-2002 for a period of five years. Clarifications/guidelines regarding the manner of fixation of the gas price would be issued separately by this Ministry.

[vi] Over the period October 1, 1997 to March 31, 2000, the transportation charge payable to GAIL along the HBJ pipeline would be Rs.1150/MCM. The transportation charge will increase by 1% for every 10% increase in the consumer price index. This increase will be paid to GAIL out of the Gas Pool Account. The transportation charge will be linked to the calorific value of 8500 K. Cal/cu. mtr. till such time as it would be denominated in terms of calories. The transportation charge will be reviewed after years.

[vii] In addition to the price as fixed above, the transportation charges and royalty, taxes duties and other statutory levies on the production, transportation and sale of natural gas will be payable by the consumers."

[xii] Contractual issues relating to the gas supply contract of GAIL including minimum guaranteed offtake, penalty for non-supply etc. will be reviewed by the Ministry of Petroleum and Natural Gas in consultation with the Gas Linkage Committee."

17.2 On plain reading of agreement and the pricing order it is clear that the respondents were not entitled to charge any amount more than what is fixed by the Government of India. On a plain reading of the contract and the term of the price order it is clear that in view of the direction of the Central Government and the Price Order, the contention of the petitioner is required to be accepted. I am of the view that the respondent no.3 being the agency of the Central Government, ought to have accepted the recommendation of the Central Government and ought not to have charged transportation charges.

17.3 It is clear that looking to the need of the petitioner the respondent no.3 has taken undue advantage of the situation. In my view, the respondent no.3 being a State Agency should not have acted in pure commercial manner showing greed for

profit. It is of course true that the public limited company should have profit, but such profit should not be earned in an arbitrary manner. When the petitioner has invested huge amount and laid down pipeline for transportation of gas, and when the Government of India has not prescribed for charge of transportation charges, the respondent no.3 GAIL was not justified in demanding such charges. The contentions raised on behalf of the petitioner in this regard are required to be accepted.

17.4 From the above it is clear that the price of the gas cannot exceed beyond the price mentioned in clause II of the Pricing Order. Looking to the order of GLC, GAIL was not justified in charging transportation charges from the petitioner. I am further of the opinion that the issue was pending before the Central Government even prior to 1.5.2000 and therefore it cannot be said that there is delay in approaching the Court. In view of the decision in the case of ABL International Limited & Anr and other decisions (supra), the facts of this case do not inhibit this Court from granting the relief sought for by the petitioner. Further, in view of various Pricing Orders and the recommendation of the Shanker Committee, there should have been 15% discount for supply of gas on fall back basis.

18.0 In the result the petition succeeds. The notice dated 1.5.2001 is hereby quashed and set aside. It is held that the petitioner is not liable to pay transportation charges for 0.35 MMSMDC supply of gas along the ex-HBJ pipeline for the supply from landfall point. It is further held that the GAIL is required to follow the Pricing Orders dated 31.12.1991, 18.9.1997 and 30.9.1997. The petitioner shall be entitled to get all the consequential benefits in pursuance of the implementation of Pricing

orders of Government of India including 15% rebate on fall back basis as per the agreement. . It is observed that the metering charges should be proportionate to the expenses incurred by the respondent no.3 and it should not be disproportionate. Rule is made absolute accordingly with no order as to costs.

[K.S. JHAVERI, J.]

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